SUPREME COURT, U.S.
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No. 06-__

IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITION FOR A WRIT OF CERTIORARI

BOBBY L. BURGNER
FRANK YANOVER
JOHN AMATO
GENERAL ELECTRIC COMPANY
3135 Easton Turnpike
Fairfield, CT 06828
(203) 373-2501

WALTER HELLERSTEIN *
JEROME B. LIBIN
MARYANN H. LUONGO
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

WILLIAM F.J. ARDINGER
RATH, YOUNG AND PIGNATELLI, P.C.
One Capital Plaza
Concord, NH 03302
(603) 226-2600

* Counsel of Record

Counsel for Petitioner

March 2, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Does the New Hampshire business profits tax regime facially discriminate against foreign commerce in violation of the Commerce Clause by providing a tax deduction for dividends received from foreign subsidiaries only to the extent that the foreign subsidiary conducts income-generating business in the State, a restriction virtually identical to restrictions struck down by this Court in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), and by state courts of North Dakota and California?

PARTIES TO THE PROCEEDING

The parties are as stated in the caption. In the Superior Court of Merrimack County, New Hampshire, the respondents were Stanley R. Arnold, Commissioner of New Hampshire Department of Revenue Administration and the New Hampshire Department of Revenue Administration.

RULE 29.6 STATEMENT

Petitioner has no parent corporation. There is no publicly held company that owns 10% or more of petitioner's stock.

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITION FOR A WRIT OF CERTIORARI

General Electric Company respectfully petitions this Court to grant a writ of certiorari to review the judgment of the Supreme Court of New Hampshire in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire (App. 1a-21a) is reported at 914 A.2d 246. The orders of the Superior Court of Merrimack County, New Hampshire (App. 22a-43a; App. 44a-49a) are not officially reported.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered on December 6, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl. 3, provides: "The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Relevant portions of the New Hampshire statutes are set forth at App. 65a-72a.

STATEMENT

This case raises in the context of foreign commerce an issue that this Court and other state courts have previously addressed in the context of interstate commerce. The New Hampshire income tax regime at issue here grants a dividends received deduction to corporate shareholders of foreign corporations only to the extent the underlying corporation engages in in-state business activity. In *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), this Court held that a state intangibles tax regime granting a tax base deduction to corporate shareholders only to the extent the underlying corporation engaged in in-state business activity "facially discriminates against interstate commerce." *Id.* at 333. *Fulton* thus compels the conclusion that the New Hampshire regime impermissibly discriminates against foreign commerce. Moreover, every state court evaluating other States' tax regimes with deductions virtually identical to New Hampshire's, although applied with respect to domestic subsidiaries, has concluded that such regimes facially discriminate against interstate commerce.[1] The court below, however,

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[1] See *General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006); *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003), *cert. denied*, 540 U.S. 1178 (2004); *Ceridian Corp. v. Franchise Tax Bd.*, 102

viewed *Fulton* as "not analogous" (App. 20a) and simply did "not agree with [the] analysis" of the state courts that relied on *Fulton* in striking down admittedly "similar" regimes. App. 21a.

This case also raises a second issue that this Court has previously addressed in the context of interstate commerce. In *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977), this Court condemned a state tax regime granting a tax benefit for an interstate transaction with local attributes over a comparable interstate transaction without local attributes, because the regime "discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses." *Id.* at 335. The New Hampshire tax regime under consideration here likewise grants a tax benefit for foreign dividends with local attributes over comparable foreign dividends without local attributes. *Boston Stock Exchange* thus compels the conclusion that the New Hampshire regime impermissibly discriminates between two types of foreign transactions to favor local commercial interests over out-of-state business. The court below, however, while citing *Boston Stock Exchange* (App. 18a-19a), sustained the State's tax regime without explaining how its result can be squared with the rule of that case.

Simply put, the decision below resolves under the "foreign" Commerce Clause an issue this Court and other state courts have previously resolved differently under the "interstate" Commerce Clause.[2] In so doing, the court below has precipitated a conflict with several other state court decisions, as well as with decisions of this Court.

Cal. Rptr. 2d 611 (Cal. App. 2000); *D.D.I., Inc. v. State*, 657 N.W.2d 228 (N.D. 2003).

[2] If the commerce under consideration in these cases had been foreign rather than interstate, the taxing statutes at issue would have raised "foreign" rather than "interstate" Commerce Clause questions.

1. New Hampshire's Taxing Regime (1990-1999)

During the tax years at issue, New Hampshire imposed a business profits tax (BPT) at the rate of between 7 and 8 percent on the "taxable business profits" of every business organization. N.H. Rev. Stat. Ann. § 77-A:2. "Taxable business profits" is essentially federal taxable income, as modified by specified state adjustments and apportioned to the State. *Id.* § 77-A:1, III and IV. Although each taxable business organization ordinarily reports its own income on a separate basis, when a group of commonly controlled corporations engages in a unitary business, *i.e.*, a business characterized by economic interdependence, *id.* § 77-A:1, XIV, the unitary group reports its income to New Hampshire on the basis of combined reporting. *Id.* 77-A:1, XIII, XV, XVI. Under combined reporting, the income of the unitary group members is combined on a single return; intercompany transactions among group members (such as payment of dividends) are eliminated (*i.e.*, disregarded); and the resulting income is apportioned to New Hampshire by a formula reflecting the ratio of the group's property, payroll, and sales within the State to the group's property, payroll, and sales wherever located. *Id.* § 77-A:1, XVI, 77-A:3, 77-A:6, IV.

New Hampshire's combined reporting method does not apply to every member of the unitary group. If a unitary foreign corporation has 80 percent or more of the average of its payroll and property outside the United States, the corporation (hereinafter a "foreign subsidiary"[3]) is excluded from the combined report.[4] Instead, New Hampshire taxes such

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[3] This is consistent with the usage throughout this litigation, although the statute denominates such corporations as Overseas Business Organizations. N.H. Rev. Stat. Ann. § 77-A:1, XIX.

[4] For this reason, the statute describes the unitary group that actually files on a combined basis in New Hampshire as the "water's edge combined group," N.H. Rev. Stat. Ann. § 77-A:1, XV, because the group stops at the water's edge insofar as foreign subsidiaries are concerned.

foreign subsidiaries under a "separate company" reporting method. Under the separate company reporting method, any foreign subsidiary that does business in New Hampshire files a separate return computing its own income properly apportioned to the State. Such income is subject to the BPT independently of the BPT imposed on the income of the combined group. If a foreign subsidiary does no business in New Hampshire, it does not file a separate return there.

If any foreign subsidiary pays a dividend to a member of the New Hampshire combined group, the foreign dividend payment is treated as a separate stream of taxable income to the group. N.H. Rev. Stat. Ann. § 77-A:3, II. Such separate treatment differs from the treatment of dividends paid by members of the combined group to one another. Those intragroup dividends are disregarded and eliminated from the group's income as intercompany items. The foreign dividends, by contrast, are separately apportioned to New Hampshire, and the apportioned amount is added to the group's combined income to determine the group's total income subject to the BPT.[5]

Finally, and for purposes of this case most importantly, if a foreign subsidiary pays a dividend to a member of the combined group *and the foreign subsidiary is engaged in business generating taxable income in New Hampshire*, the group's income (including the dividend) subject to the BPT is reduced by a dividends-received deduction (DRD) equal to the amount of taxable income the foreign subsidiary reported in New Hampshire on its separate return. N.H. Rev. Stat. Ann. § 77-A:4, IV; App. 10a-11a. By contrast, if the foreign subsidiary pays a dividend to a member of the combined group *and the*

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[5] This separate category of income is described as "New Hampshire foreign dividends taxable business profits." App. 4a. The dividends are apportioned under the unitary group's formula, as modified to reflect the foreign subsidiary's non-New Hampshire apportionment factors. N.H. Rev. Stat. Ann. § 77-A:3, II(b).

*foreign subsidiary is **not** engaged in business in New Hampshire*, the group's income (including the dividend) subject to the BPT is fully taxed and no DRD is allowed.

2. Facts

As the court below explicitly recognized, "[t]he facts are not disputed by the parties." App. 9a; see also App. 6a (referring to "undisputed facts") and 21a.

a. GE and its Affiliates

General Electric Company (GE or petitioner) is a New York corporation with its principal offices in Connecticut. During the tax years at issue (1990-99), GE carried on extensive business activities throughout the United States, including New Hampshire. In addition to carrying on its own activities, GE was the common parent of numerous affiliated corporations, domestic and foreign, that carried on a wide range of business operations within and without the United States, including manufacturing, finance, broadcasting, and insurance. During each of the tax years, a portion of GE's business operations was conducted by foreign affiliates that did no business in New Hampshire or in any other State.

b. Taxation of GE and its Affiliates

Because it conducted business within New Hampshire, GE was required to file a New Hampshire BPT return and pay a BPT for each of the tax years at issue. In determining GE's BPT liability for the each of the tax years, GE and respondent agreed for purposes of this case only that GE and its affiliates should be treated as engaged in a "unitary business" within the meaning of the BPT statute, and that GE and its domestic unitary affiliates should be treated as one combined group (the "domestic combined group"). Accordingly, the income of the group members was combined, intercompany transactions (such as payment of domestic dividends) were eliminated, and the resulting income was apportioned to New

Hampshire by the three-factor formula reflecting the New Hampshire portion of the group's property, payroll, and sales.

Pursuant to New Hampshire's BPT statute, GE's foreign subsidiaries were excluded from the domestic combined group.[6] Under New Hampshire's regime, those foreign subsidiaries were each treated on a separate company basis, both with respect to their own BPT obligations and with respect to transactions with members of GE's domestic combined group. Because GE's foreign subsidiaries did no business in New Hampshire, they did not file their own BPT tax returns.

During each of the tax years at issue, certain of GE's foreign subsidiaries paid dividends to GE and other members of the domestic combined group (the "foreign dividends"). These dividends, as apportioned to New Hampshire, were added to the domestic combined group's income to determine the group's total BPT liability. Because GE's foreign subsidiaries did no business in New Hampshire, the statute denied GE's domestic combined group any DRD with respect to such dividends.

3. The Refund Claim

Respondent audited GE's BPT returns for the tax years at issue. Throughout the audit, GE consistently contended that allowing a DRD when a dividend-paying foreign subsidiary conducts business in New Hampshire, but denying a DRD with respect to its dividend-paying foreign subsidiaries because they conducted no business in the State, facially discriminated against foreign commerce in violation of the Commerce Clause. Respondent rejected GE's contention, but executed two settlement agreements with GE preserving this constitutional issue for appeal. The parties agreed that "GE would receive a refund of approximately $3.15 million should the foreign dividend deduction issue be resolved in GE's

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[6] See pp. 4-5.

favor." App. 2a. GE filed a timely request for a refund based on its constitutional claim, which respondent's hearing officer denied because he lacked power to decide whether the state statute violates the federal Constitution.

4. The Proceedings Below

GE timely appealed to the New Hampshire Superior Court. GE claimed, among other things, that the New Hampshire statute should be invalidated because it discriminates against foreign commerce in violation of the Commerce Clause. The court ruled against GE on the merits.

GE appealed to the New Hampshire Supreme Court. After disposing of preliminary state law issues that are no longer in dispute, that court turned to the "central issue in this case," (App. 12a), whether the DRD "facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire." App. 12a.

Rather than addressing GE's straightforward comparison between dividends received from (a) foreign subsidiaries doing business in the State and (b) foreign subsidiaries not doing business in the State, the New Hampshire court instead characterized the issue before it as one involving an examination of the State's "taxing regime as a whole" (App. 17a) and "the aggregate tax assessed against the unitary business in New Hampshire." App 21a. Under this approach, the court was able to reject GE's claim of discrimination because the "aggregate" BPT on the foreign subsidiary itself *and* on the dividends it paid to the combined group would be greater (even with the DRD) when the subsidiary conducted business and generated taxable income in the State than when it did not conduct business in the State.

The difference between the two approaches may be illustrated as follows:

GE's Comparison		
BPT paid by combined group on dividends received from foreign subsidiary **not** doing income-generating business in New Hampshire	v.	BPT paid by combined group on dividends received from foreign subsidiary doing income-generating business in New Hampshire
New Hampshire Supreme Court's Comparison		
BPT paid by foreign subsidiary **not** doing income-generating business in New Hampshire *and* BPT paid by combined group on dividends received from such subsidiary	v.	BPT paid by foreign subsidiary doing income-generating business in New Hampshire *and* BPT paid by combined group on dividends received from such subsidiary

As support for its "aggregate" approach, the New Hampshire court relied heavily on a footnote in this Court's decision in *Kraft General Foods, Inc.* v. *Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992). *Kraft* involved Iowa's separate company reporting regime applicable to all corporations doing business in that State. In *Kraft*, this Court struck down as facially discriminatory the DRD that Iowa provided for dividends received from domestic subsidiaries, but not for dividends received from foreign subsidiaries. In the course of its opinion, this Court in footnote 23 addressed the proper basis for determining whether there was impermissible discrimination:

> If one were to compare the aggregate tax imposed by Iowa on a unitary business which included a subsidiary doing business throughout the United States (including Iowa) with the aggregate tax imposed by Iowa on a unitary business which included a foreign subsidiary

> doing business abroad, it would be difficult to say that Iowa discriminates against the business with the foreign subsidiary. Iowa would tax an apportioned share of the domestic subsidiary's entire earnings, but would tax only the amount of the foreign subsidiary's earnings paid as a dividend to the parent.
>
> In considering claims of discriminatory taxation under the Commerce Clause, however, it is necessary to compare the taxpayers who are "most similarly situated." A corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad. In the former case, the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary. A more appropriate comparison is between corporations whose subsidiaries do not do business in Iowa.

Kraft, 505 U.S. at 80 n.23 (citation omitted).

Based on footnote 23, the court below proceeded to "assess New Hampshire's taxing regime as a whole and look at the aggregate tax imposed upon a unitary business." App. 17a. Using this approach, the court found "no improper discriminatory treatment." *Id.* As the court saw it, taxing a foreign subsidiary doing business in New Hampshire on its own business profits, and permitting a DRD for any dividends paid by that subsidiary, up to the amount of its business profits that were separately taxed, ensured that "the income of the business entity is taxed only once." App. 18a. By contrast, because a foreign subsidiary that conducts no business in New Hampshire pays no tax on its business profits, its apportioned dividends are properly taxable without a DRD "because that dividend income has been taxed only once." *Id.*

The court acknowledged that several other state courts have reached a contrary result with respect to domestic subsidiary DRDs limited in the same manner as New Hamp-

shire's. It stated simply that "we do not agree with their analysis." App. 21a. The court also gave limited attention to this Court's decision in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996). In the court's eyes, the critical difference between the two cases was that the state tax regime in *Fulton* "taxed stock ownership and treated in-state stock more favorably than stock held in out-of-state corporations" (App. 20a), whereas in the instant case, the state was "taxing a proportionate share of dividend *income* coming into the state." App. 20a (emphasis in original).

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for two compelling reasons. First, the decision below has created a clear conflict with the decision of another state court of last resort, and with the decisions of other state courts as well, over the important federal question whether a State may limit deductions for dividends received to those received from corporations doing business in the State. Second, the decision below cannot be reconciled with two decisions of this Court—*Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), and *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977)—that found tax regimes to be unconstitutionally discriminatory under the interstate Commerce Clause for reasons that apply with even greater force to New Hampshire's tax regime under the foreign Commerce Clause.

I. THE DECISION BELOW CREATES A CLEAR CONFLICT BETWEEN DECISIONS OF STATE COURTS OF LAST RESORT

In upholding a DRD limited to dividends received from corporations doing business and generating taxable income in the State, the New Hampshire Supreme Court has created a clear conflict with the decision of another state court of last resort on an important federal question. In *D.D.I., Inc. v.*

State ex rel. Clayburgh, 657 N.W.2d 228 (N.D. 2003), the North Dakota Supreme Court struck down as unconstitutionally discriminatory a DRD that in all essential respects was identical to New Hampshire's. North Dakota provided a DRD equal to the amount of "the dividend payor's income . . . subject to North Dakota corporate income tax," *D.D.I.*, 657 N.W.2d at 233, just as New Hampshire provides a DRD equal to "the amount of business profits already taxed by the state." App. 11a. North Dakota denied a DRD for dividends received from corporations doing no business in North Dakota, *D.D.I.*, 657 N.W.2d at 233, just as New Hampshire denies a DRD for dividends received from foreign corporations doing no business in New Hampshire. The North Dakota court concluded that a DRD linked to the in-state of activity of the dividend payor "impermissibly discriminates against interstate commerce," *D.D.I.*, 657 N.W.2d at 235. The New Hampshire court "found no improper discriminatory treatment" in an identical DRD. App. 17a. It would be difficult to find a starker conflict between decisions of state courts of last resort.

The decision below is also in conflict with a series of California Court of Appeal decisions that have invalidated DRDs virtually identical to New Hampshire's. Thus, in *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003), *cert. denied*, 540 U.S. 1178 (2004), the court found that California's DRD "is discriminatory on its face because it affords to taxpayers a deduction for dividends received from corporations subject to tax in California, while no deduction is afforded for dividends received from corporations not subject to tax in California." *Id.* at 398. Accord, *General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d 611 (Cal. App. 2000).

The court below half-heartedly sought to distinguish the North Dakota and California decisions by conjecturing that "it may be that in those cases, there was no taxing symmetry as there is here." App. 21a. The court's imagined distinction lacks any foundation in fact. Precisely the same "symmetry" existed in the North Dakota and California cases, namely, the income in question was taxed only once, either to the parent (in the form of dividends) or to the taxable subsidiary. Indeed, this was precisely the basis on which the taxing authorities in those cases sought to defend the taxes. *See, e.g., D.D.I.*, 657 N.W.2d at 233 ("The [dividends received deduction] insures that, in the end, there is only one level of North Dakota income tax on North Dakota income"); *Farmer Bros.*, 134 Cal. Rptr. 2d at 396-97 ("The purpose of [the statute] is to prevent the imposition of a second tax upon the stream of income leading to the dividend") (internal quotation marks omitted). Both the North Dakota and California courts roundly rejected the "taxing symmetry" justification.

More candidly, the court below recognized that its decision was creating a conflict with the decisions of other state courts. Regardless of any purported factual basis for distinguishing the decisions of the other state courts, the court below declared flatly that "we do not agree with their analysis." App. 21a.

In short, the decision below has precipitated a clear and irreconcilable conflict with another state court of last resort and with other important state courts as well. This Court should grant certiorari to resolve the conflict on this significant issue.

II. THE DECISION BELOW CONFLICTS WITH SETTLED DECISIONS OF THIS COURT

The decision below is incompatible with two decisions of this Court.

A. *Fulton Corp.* v. *Faulkner*

In *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), this Court considered a North Carolina intangible property tax as applied to taxpayers who owned corporate stock. The tax was imposed at the rate of 0.25 percent of the fair market value of the stock. The value of the stock assessed under the tax, however, was reduced by a deduction equal to the percentage of the corporation's income subject to tax in North Carolina. Under this regime, the stock of a corporation doing all of its business in North Carolina would be subject to no intangible tax; the stock of a corporation doing 50 percent of its business in North Carolina, would be subject to tax on 50 percent of the stock's value; and the stock of a corporation doing none of its business in North Carolina would be subject to tax on 100 percent of its value. This Court had no hesitation in branding North Carolina's taxing scheme as "facially discriminatory" (*id.* at 333):

> A regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce.

Id.

New Hampshire's DRD suffers from the same constitutional infirmity that afflicted the North Carolina taxing regime. Just as North Carolina's regime facially discriminated against interstate commerce by providing a tax deduction for corporate shareholders only to the extent the underlying corporation engaged in in-state business activity, so New Hampshire's tax regime facially discriminates against foreign commerce by providing a tax deduction for corporate shareholders only to the extent the underlying corporation engages in in-state business activity. In both cases, the regime favors corporations engaging in local activity over their out-of-state

competitors and tends to discourage corporations from plying their trades in protected commerce, whether interstate or foreign.

The fact that New Hampshire's regime facially discriminates against foreign commerce whereas North Carolina's regime discriminated against interstate commerce provides no basis for distinguishing the New Hampshire DRD under the Commerce Clause. This Court has made it clear that the protection afforded by the dormant Commerce Clause to foreign commerce "is broader than the protection afforded to interstate commerce," *Kraft General Foods, Inc.* v. *Iowa Department of Revenue and Finance*, 505 U.S. 71, 79 (1992). *See also Japan Line, Ltd., et al.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). Hence, there is an even more compelling Commerce Clause objection to New Hampshire's taxing scheme than to North Carolina's.

The court below claimed that *Fulton* was "not analogous to the present case" (App. 20a) because in *Fulton* "the state taxing regime taxed stock ownership and treated in-state stock more favorably than stock held in out-of-state corporations" *id.*, whereas in the instant case, the state was "taxing a proportionate share of dividend *income* coming into the state." *Id.* (emphasis in original). But the court did not explain why discrimination in favor of in-state activity under an income tax is any more tolerable under the Commerce Clause than discrimination in favor of in-state activity under an intangible property tax. Indeed, the state courts that have uniformly invalidated DRDs similar to New Hampshire's have found this Court's analysis in *Fulton* controlling. *See D.D.I.*, 657 N.W.2d at 231-32 (discussing and applying *Fulton*); *General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d at 57 (same), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006); *Farmer Bros.*, 134 Cal. Rptr. 2d at 318 (same); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d at 619 (same).

B. *Boston Stock Exchange* v. *State Tax Commission*

The decision below is also inconsistent with this Court's decision in *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977). There, this Court considered a New York stock transfer tax scheme that provided, *inter alia*, a reduced tax on certain stock transfers by nonresidents through New York transfer agents when the stock sale was effected on a New York-based stock exchange rather than on an out-of-state exchange. This Court held the scheme violated the Commerce Clause because it granted a tax benefit for an interstate transaction with local attributes but not for a comparable interstate transaction without local attributes. The taxing scheme was objectionable because it "discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses." *Id.* at 335.

New Hampshire's DRD contains the same constitutional flaw as New York's stock transfer tax regime. Just as New York's regime favored local commercial interests by reducing the tax on interstate stock transfers with a local flavor, so New Hampshire favors local commercial interests by reducing the tax on foreign dividend payments with a local flavor. If New York may not reduce its tax on interstate commerce by tying the reduction to the conduct of local business activity (having one's otherwise taxable stock transfer be the product of a New York sale), surely New Hampshire may not reduce its tax on foreign commerce by tying the reduction to the conduct of local business activity (having one's otherwise taxable dividend emanate from a New Hampshire-taxpaying foreign subsidiary). As with *Fulton*, the fact that the New Hampshire regime discriminates against foreign commerce whereas New York's regime discriminated against interstate commerce only strengthens the force of the Commerce Clause objection to New Hampshire's taxing scheme vis-a-vis New York's. Although the court below cited *Boston Stock Ex-*

change, App. 18a-19a, it made no effort to explain how its decision could be reconciled with the rationale of that case.

C. *Kraft* Provides No Basis for Disregarding *Fulton* and *Boston Stock Exchange*

The attempt of the New Hampshire court to sidestep the inconsistency of its conclusion with *Fulton* and *Boston Stock Exchange* rests on its misguided reliance on this Court's footnote 23 in *Kraft*. The court below read this footnote as authorizing consideration of "the aggregate tax imposed upon a unitary business," App. 17a, including the tax imposed on *both* the dividend recipient *and* the dividend payor. In so concluding, the court below completely misread and misapplied footnote 23.

Indeed, the New Hampshire court's "aggregate tax" analysis makes precisely the same mistake that this Court identified in footnote 23. There, this Court considered, in the context of Iowa's separate company reporting regime, an attempt to defend that State's discriminatory DRD provision with assertions that the "aggregate tax" on a parent with a domestic subsidiary doing business in Iowa might not always be less than the "aggregate tax" imposed by Iowa on a parent with a dividend-paying foreign subsidiary not doing business in Iowa. This Court rejected that defense by noting that it was inappropriate to include the Iowa tax imposed on the domestic subsidiary's earnings in the comparison analysis because "the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary." *Kraft*, 505 U.S. at 80 n.23. This Court concluded that the "aggregate tax" comparison offered by the State (and by the United States as *amicus curiae*) failed to compare taxpayers who are "most similarly situated." *Id.* In order to avoid including income for which there was an "independent basis for taxation" under Iowa's separate company reporting regime, this Court held that the "more appro

priate comparison is between corporations whose subsidiaries do not do business in Iowa." *Id.*

New Hampshire's tax regime imposes tax liability on domestic combined groups, on the one hand, and foreign corporations, on the other, as separate filing entities. A combined group doing business in New Hampshire files a return with the State, and any foreign corporation doing business there files its own separate return with the State. If the court below had adopted a proper reading of *Kraft*'s footnote 23, it would have concluded that the most similarly situated taxpayers for comparison purposes in this case are two domestic combined groups that do business in New Hampshire, one with a foreign subsidiary that also does business in New Hampshire and files a separate return there, the other with a foreign subsidiary that does not do business in the State. Assuming both foreign subsidiaries pay the same amount of dividends to their respective parent companies in a given year, the appropriate calculation would show that the total tax imposed on the combined group whose foreign subsidiary does business in the State will always be less than the total tax imposed on the combined group whose foreign subsidiary does not do business in the State. The reason for that is New Hampshire's discriminatory DRD, which is available to the combined group only to the extent that a dividend-paying foreign subsidiary generates taxable income in the State.

What would be *inappropriate* under *Kraft* in making the necessary comparison here would be to compare the "aggregate" New Hampshire tax liabilities of *both* the combined groups *and* their respective foreign subsidiaries. Yet, that is exactly what was done by the court below. Because there is as much of an "independent basis" for New Hampshire to tax the income of a foreign subsidiary doing business in the State as there was for Iowa to tax the income of the domestic subsidiary referenced in footnote 23, the decision of the court below to include the New Hampshire tax on the foreign

subsidiary's income in its "aggregate tax" calculation is directly contrary to this Court's teachings in *Kraft*.

In short, *Kraft* reinforces petitioner's position regarding the appropriate comparison for determining discrimination in this case, and it provides no basis for the New Hampshire Court's disregard of the controlling force of *Fulton* and *Boston Stock Exchange*.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

BOBBY L. BURGNER
FRANK YANOVER
JOHN AMATO
GENERAL ELECTRIC COMPANY
3135 Easton Turnpike
Fairfield, CT 06828
(203) 373-2501

WALTER HELLERSTEIN *
JEROME B. LIBIN
MARYANN H. LUONGO
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

WILLIAM F.J. ARDINGER
RATH, YOUNG AND PIGNATELLI, P.C.
One Capital Plaza
Concord, NH 03302
(603) 226-2600

* Counsel of Record

Counsel for Petitioner

March 2, 2007

APPENDIX

APPENDIX A

THE SUPREME COURT OF NEW HAMPSHIRE
MERRIMACK

No. 2005-668

GENERAL ELECTRIC COMPANY, INC.

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

Argued: July 21, 2006
Opinion Issued: December 5, 2006

Rath, Young and Pignatelli, P.C., of Concord (*William F. J. Ardinger* and *Andrew W. Serell* on the brief, and *Mr. Ardinger* orally), and *Walter Hellerstein*, of Athens, Georgia, on the brief, for the plaintiff.

Kelly A. Ayotte, attorney general (*Karen A. Schlitzer*, assistant attorney general, on the brief and orally), and *Kathleen J. Sher*, of Concord, on the brief, for the defendant.

HICKS, J. The plaintiff, General Electric Company, Inc. (GE), appeals the decision of the Superior Court (*Fitzgerald*, J.) granting motions filed by the defendant, New Hampshire Department of Revenue Administration (department), to dismiss for lack of standing and for summary judgment. We reverse the grant of the motion to dismiss and affirm the grant of the motion for summary judgment.

The record supports the following facts. This case involves business profits taxes paid by GE from 1990 through 1999

(the tax years). GE is a New York corporation with its principal offices in Connecticut, and with a place of business in Somersworth, New Hampshire. GE is the parent corporation of numerous affiliated corporations both domestic and foreign. None of GE's foreign affiliates was domiciled in or transacted business within New Hampshire during the tax years.

During the tax years, GE transacted business within New Hampshire as a "business organization" and was subject to the business profits tax (BPT). RSA 77-A:1, I (2003) (amended 2004), :2 (2003), :6, I (2003). GE paid the BPT during the tax years, but maintains that its tax liability was miscalculated resulting in overpayment. Specifically, GE challenges the constitutionality of RSA 77-A:4, IV (2003), which permits a parent corporation to take a deduction for dividends received from its corporate subsidiaries when the gross business profits of the subsidiaries have already been subject to tax in New Hampshire. The department denied GE's requests to use this deduction for dividends it received from its foreign subsidiaries, since they did not transact business in the state and therefore their gross business profits were not subject to tax in New Hampshire.

GE and the department executed two settlement agreements agreeing, among other things, that GE would receive a refund of approximately $3.15 million should the foreign dividend deduction issue be resolved in GE's favor. GE subsequently filed with the department requests for refunds and petitions for redetermination and reconsideration regarding its BPT returns. Because the department's hearings officer lacked the authority to determine the constitutionality of RSA 77-A:4, IV, GE petitioned the superior court for review pursuant to RSA 21-J:28-b, IV (2000) (amended 2003). GE moved for summary judgment and the department moved to dismiss and for summary judgment. The trial court granted the department's motion to dismiss on the ground that GE

lacked standing to challenge RSA 77-A:4, IV. The trial court alternatively granted the department's motion for summary judgment finding that, even if GE had standing to challenge the statute, the deduction in RSA 77-A:4, IV does not discriminate against foreign commerce in violation of the Commerce Clause of the Federal Constitution.

We begin with a review of New Hampshire's BPT regime. Calculation of a business's tax liability requires an initial determination of whether the business is "unitary" within the meaning of RSA 77-A:1, XIV (2003). A "unitary business" is "one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions." RSA 77-A:1, XIV. Neither party disputes that GE and its subsidiaries operate as a unitary business.

The tax liability of a unitary business is calculated using a combined reporting method that apportions the income of the unitary business to the state. RSA 77-A:1, XIII, XV, XVI (2003). The income from all domestic members of the unitary business, which are collectively referred to as the "water's edge combined group," RSA 77-A:1, XV, is aggregated in the combined report. RSA 77-A:1, XVI. The income of foreign members of the unitary business is excluded from the combined report if the foreign members qualify as an "overseas business organization[ ]." RSA 77-A:1, XV. "Overseas business organizations" (OBOs) are those business organizations "with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia." RSA 77-A:1, XIX (2003). Although an OBO is not considered part of the water's edge combined group, it may still qualify as a unitary member. RSA 77-A:1, XIV, XV.

Once the net income from all members of the water's edge group is combined, any domestic "intergroup activity" such as the payment of dividends or royalties is excluded in determining the "gross business profits" of the group. *N.H. Admin. Rules*, Rev 302.10(b); *see* RSA 77-A:3, I (2003). The "gross business profits" are then apportioned to the state using three factors: property, payroll and sales. RSA 77-A:3, I. The resulting amount constitutes the "New Hampshire water's edge taxable business profits" of the group. See RSA 77-A:1, IV, XV, XVI; *N.H. Admin. Rules*, Rev 301.02. In this calculation, the dividends of an OBO that are paid to a member of the water's edge combined group are initially excluded from the group's gross business profits and are apportioned separately to determine the "New Hampshire foreign dividends taxable business profits." RSA 77-A:3, II(b) (2003); *N.H. Admin. Rules*, Rev 311.24(a), (f). The "New Hampshire foreign dividends taxable business profits" are then added to the "New Hampshire water's edge taxable business profits" to produce "New Hampshire taxable business profits." RSA 77-A:3, II(b)(6). The applicable tax rate is then applied, resulting in the tax due. RSA 77-A:2 (2003). In this manner, dividends paid by a foreign member of the unitary group to domestic members are apportioned to New Hampshire and taxed.

Pursuant to the parties' settlement agreement, GE and its domestic unitary affiliates are to be treated as one water's edge combined group within the meaning of RSA 77-A:1, XV. As such, the income of GE's foreign subsidiaries was excluded from the calculation of GE's tax liability for the tax years because each was an OBO within the meaning of RSA 77-A:1, XIX. However, pursuant to RSA 77-A:3, II(b), the dividends paid to GE by its foreign subsidiaries remained subject to an apportioned tax. It is the inclusion of these foreign dividends in calculating GE's taxable business profits that GE contests in this appeal.

RSA 77-A:4, IV provides for the following deduction from gross business profits:

> In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

RSA 77-A:4, IV has traditionally been used by corporations with affiliates or subsidiaries that file separately, and not under the combined reporting method. In such instances, RSA 77-A:4, IV allows a deduction for dividends paid to taxable parent corporations by subsidiaries that conducted business in the state and were therefore subject to a separate BPT. The dividends received from foreign subsidiaries that do not conduct business in the state and, accordingly, pay no BPT, do not qualify for the deduction allowed by the statute. RSA 77-A:4, IV.

On appeal, GE argues that the trial court improperly granted the department's motion for summary judgment and that by limiting the dividends-received deduction to those parents whose subsidiaries conduct business in the state, the statute facially discriminates against foreign commerce in violation of the Commerce Clause of the United States Constitution. GE also appeals the trial court's grant of the department's motion to dismiss based upon a lack of standing.

I. Motion to Dismiss

> In considering a motion to dismiss, our standard of review is whether the allegations in the plaintiff's plead-

> ings are reasonably susceptible of a construction that would permit recovery. We assume the plaintiff's pleadings to be true and construe all reasonable inferences drawn therefrom most favorably to it. We need not assume the truth of statements in the plaintiffs complaint, however, which are merely conclusions of law.

In re Juvenile 2004-789, 153 N.H. 332, 334 (2006) (quotation and brackets omitted). Since the trial court applied RSA 77-A:4, IV to an undisputed set of facts, this appeal presents a question of law that we review *de novo*. *Id.*

For a court to hear a party's complaint, the party must have standing to assert the claim. *Appeal of Richards*, 134 N.H. 148, 154, *cert. denied*, 502 U.S. 899 (1991). The general rule in New Hampshire is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected. *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 35 (2005).

The trial court found that GE failed to show that "RSA 77-A:4, IV directly and specifically affect[ed] its rights." Adopting the department's statutory application argument, the court found that the statute did not apply generally to parents with foreign subsidiaries. The court also found that RSA 77-A:4, IV did not apply specifically to GE since "the purpose of the statute is to prevent double taxation" and GE's foreign subsidiaries were never subject to taxation in New Hampshire.

To qualify for the dividend-received deduction, RSA 77-A:4, IV requires that the dividend recipient must qualify as a "parent of an affiliated group" as defined by the United States Internal Revenue Code (IRC). RSA 77-A:4, IV. Section 1504(a) of the IRC defines "affiliated group," in part, as: "1 or more chains of includable corporations connected through stock ownership with a common parent." 26 U.S.C. § 1504(a)(1)(A) (2000). This term is further defined in the statute to require minimum stock ownership of eighty percent

between the parent and its affiliates and to limit the type of corporations that are considered "includable." *Id.* § 1504(a)(2)(B) (2000). Foreign corporations are specifically excluded from the definition of "includable corporation." *Id.* § 1504(b)(3) (2000). The trial court relied in part upon this exclusion to find that GE does not have standing to challenge the constitutionality of RSA 77-A:4, IV because GE's challenge relates only to its foreign subsidiaries. We disagree.

The plain language of RSA 77-A:4, IV shows that the phrase "parent of an affiliated group" refers to the parent company's status, and not that of the subsidiaries. In other words, as long as the stock requirements are met with regard to an includable subsidiary, it satisfies the first condition of the statute in order to receive the dividend-received deduction, which GE does. By its terms, the deduction is not necessarily limited to parents with dividend-paying subsidiaries that are also members of the affiliated group. Therefore, we hold that GE qualifies as a "parent of an affiliated group" under RSA 77-A:4, IV. However, we express no opinion as to whether the statute would apply to a parent having *only* foreign subsidiaries, as that is not the case presently before us.

The department also argues, and the trial court agreed, that GE lacks standing to challenge RSA 77-A:4, IV because "GE is a unitary business and RSA 77-A:4, IV does not apply and/or affect the way in which GE was taxed in New Hampshire during the applicable tax years." As a unitary business, GE is required to file under the combined reporting method discussed above. RSA 77-A:1, XIII-XVI, :3, I-III (2003). Under the combined reporting method, it makes no difference whether a corporation's subsidiaries do business in-state or out-of-state because the income from every member of the unitary group is combined and apportioned. However, because New Hampshire uses the water's edge method of apportionment, the combined income is limited to that

derived from domestic members of the unitary group. RSA 77-A:1, XV.

Any income from a foreign member of GE's unitary group was excluded from GE's combined report and was not taxed. Further, because none of GE's foreign subsidiaries did any business in New Hampshire, they did not file separate tax returns with the state. The department argues on appeal that since the purpose of RSA 77-A:4, IV is "to prevent double taxation," the statute is not applicable to GE's tax status because its foreign subsidiaries did not file separate returns in New Hampshire, were never subject to income taxation, were not taxed twice, and therefore were not entitled to receive the dividend-received deduction.

Even if we were to accept the department's argument that RSA 77-A:4, IV does not apply to GE's foreign dividends because of GE's unitary status and usage of the water's edge combined reporting method - standing is conferred upon GE to challenge the statute for the very reason that it was denied the statute's benefit. The fact that none of GE's subsidiaries conducted business within the state and thus filed no separate BPT returns or that GE operates as a unitary business does not preclude GE from challenging RSA 77-A:4, IV. Any corporate parent that pays BPT in New Hampshire but is ineligible for the dividend-received deduction in RSA 77-A:4, IV is a proper party to bring suit for a determination of whether the basis upon which it is ineligible is constitutionally permissible. Such an adjudication directly and specifically affects GE's rights as a parent corporation paying BPT in the state. *See Hughes*, 152 N.H. at 35; *Appeal of Richards*, 134 N.H. at 154. We hold that GE has sufficient interest in the outcome of this litigation to bring a constitutional challenge to RSA 77-A:4, IV. Accordingly, we reverse the order granting the department's motion to dismiss.

II. Summary Judgment

Next, we consider whether the trial court properly granted summary judgment to the department. A motion for summary judgment may be granted only where no genuine issue of material fact is present and the moving party is entitled to judgment as a matter of law. *Soper v. Purdy*, 144 N.H. 268, 270 (1999). In determining whether summary judgment should be granted, we consider the affidavits and other evidence submitted below, and any reasonable inferences to be drawn from them, in the light most favorable to the non-moving party. *Id.*

The trial court based its ruling upon a determination that "RSA 77-A:4, IV does not discriminate against foreign commerce and therefore, does not violate the United States Commerce Clause." The facts are not disputed by the parties and the question of whether RSA 77-A:4, IV violates the Commerce Clause of the Federal Constitution is a question of law that we review *de novo*. *Caterpillar Inc. v. N.H. Dep't of Revenue Admin.*, 144 N.H. 253, 255 (1999), *cert. denied*, 529 U.S. 1021 (2000).

Before we address the underlying issue of facial discrimination, we must first address GE's statutory construction argument regarding RSA chapter 77-A (2003).

A. Statutory Construction

GE argues that since foreign subsidiaries are not included as part of the water's edge combined group, they must file a separate BPT return if they conduct business in the state, thereby allowing use of the dividend-received deduction. *See* RSA 77-A:1, I (defining business organization); RSA 77-A:2 (imposing BPT on every business organization); RSA 77-A:6, I (requiring a BPT return). The department largely ignores this argument, focusing nearly its entire brief upon a comparison of domestic subsidiaries and foreign subsidiaries. However, the issue on appeal, which is consistent with GE's

argument below, focuses specifically upon whether RSA 77-A:4, IV facially discriminates against parents of dividend-paying foreign subsidiaries which do not conduct business in the state.

The department addresses this scenario summarily, asserting that any dividends from a foreign unitary group member paid to a member of the domestic unitary group that have been subject to taxation will already be excluded from the taxable business profits in order to prevent double taxation in violation of the Federal Constitution. To support this assertion, the department cites only to RSA 77-A:4, X (2003), which merely provides for the addition of expenses to gross business profits where a corporation has excluded gross business profits related to those expenses "pursuant to federal constitutional law." The department concludes from this that "RSA 77-A:4, IV never enters the analysis in a combined reporting regime." GE counters that the taxing regime does not operate in this manner and that foreign subsidiaries conducting business in the state would be required to file a separate BPT return, and any dividends paid to the parent would be deducted pursuant to RSA 77-A:4, IV.

We note that GE does not have any foreign subsidiaries that conduct business in the state. It is uncertain, therefore, exactly how the state taxing regime, including RSA 77-A:4, IV, would operate if it did. Essentially, GE asks us to evaluate a hypothetical situation. Typically, we will not invalidate a statute based upon a hypothetical factual scenario that is not before us. *New England Dragway v. M-O-H Enters.*, 149 N.H. 188, 192 (2003). However, in the context of New Hampshire's tax system, a facial attack on RSA 77-A:4, IV does raise broad constitutional concerns and is likely to come before us again. In order to reach the merits of this claim, we accept GE's hypothetical and assume without deciding that the parent of a foreign subsidiary doing business in the state

might, under certain circumstances, be entitled to the dividend-received deduction in RSA 77-A:4, IV.

The department also argues that the dividend-received deduction is of limited scope, allowing a deduction only up to the amount of gross business profits already taxed. In contrast, GE argues that RSA 77-A:4, IV allows a "full deduction for a dividend received from a foreign subsidiary doing business in New Hampshire."

This court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. *Appeal of Ann Miles Builder*, 150 N.H. 315, 318 (2003). When the issue raised presents a new question of statutory construction, we begin our analysis with an examination of the statutory language. *Id.* We are also mindful of the well-established principle of statutory construction that all words used should be given their ordinary meaning unless a different meaning is indicated from the context in which they are used. *Dupont v. Chagnon*, 119 N.H. 792, 794 (1979).

The statutory construction urged by GE, which would allow a "hyper-deduction" regardless of the amount of the tax paid in New Hampshire, might well run afoul of the Commerce Clause. However, we agree with the department that the statute, by its terms, only allows a limited dividend deduction for the amount of business profits already taxed by the state. RSA 77-A:4, IV; *cf. First Financial Group of N.H., Inc. v. State*, 121 N.H. 381, 385 (1981); *Concord Inv. Corp. v. N.H. Tax Comm'n*, 114 N.H. 105, 109 (1974). The purpose of the dividend-received deduction is "to prevent double taxation on the *identical* gross business profits" of a subsidiary and its parent. RSA 77-A:4, IV (emphasis added). Allowing a full deduction for dividends paid to a parent when the subsidiary conducted only a small amount of business in the state and thus was only taxed on a small amount of its profits yields an absurd result. Although the amount of business conducted in the state by the subsidiary may allow the parent

to deduct the full amount of the dividend received in some situations, this will not always be the case. We therefore continue our analysis with the understanding that when RSA 77-A:4, IV does allow for a dividend-received deduction, the deduction is limited by the amount of income already taxed in New Hampshire.

B. Commerce Clause

This brings us to the central issue in this case: Whether RSA 77-A:4, IV facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire.

The Commerce Clause of the United States Constitution reserves to Congress the right to "regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. This clause also imputes a "negative aspect" which prohibits states from unjustifiably discriminating against or burdening interstate and foreign commerce. *Caterpillar Inc.*, 144 N.H. at 257 (quotation omitted). In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court outlined the test for determining whether a state taxing regime survives a challenge under the Commerce Clause. To be valid, the tax must: (1) have a "substantial nexus with the taxing State"; (2) be "fairly apportioned"; (3) "not discriminate against interstate commerce"; and (4) be "fairly related to the services provided by the State." *Id.* at 279.

The Supreme Court has defined Commerce Clause "discrimination" in numerous ways over the years. In 1977, the Court found discrimination where a tax "provid[ed] a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (quotation omitted). In 1994, the Court defined it as "differential treatment of in-state and out-of-state economic interests

that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oreg.*, 511 U.S. 93, 99 (1994). In 1996, the Court upheld the principle that a state taxing regime is discriminatory if it "taxes a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (quotation and brackets omitted). "State laws discriminating against interstate commerce on their face are virtually *per se* invalid." *Id.* (quotation omitted).

The party challenging the constitutionality of a state tax bears the burden of proving discrimination. *Caterpillar Inc.*, 144 N.H. at 258. In order to prove that a state tax statute violates the Commerce Clause, the taxpayer need not show the extent of disparate tax treatment or demonstrate a minimal level of discriminatory effect; the taxpayer need only prove discrimination against commerce. *Id.* However, statutes are presumed constitutional, and they will only be declared invalid "upon inescapable grounds." *Baines v. N.H. Senate President*, 152 N.H. 124, 133 (2005) (quotation omitted).

GE argues that "RSA 77-A:4, IV discriminates in violation of the commerce clause because it affords a deduction for dividends received from corporations that do business in New Hampshire, while it denies a deduction for dividends received from corporations that do not do business in New Hampshire." The department responds that it is constitutional for states to proportionately tax foreign source income and that GE fails to show that "foreign commerce is taxed more heavily than intrastate commerce."

As an initial matter, we note that the state's right to tax foreign dividends is not contested. In *Mobil Oil Corporation v. Commissioner of Taxes*, 445 U.S. 425 (1980), the Supreme Court upheld the states' right to tax foreign-source dividend income when the dividend is received by a corporation doing business in the state. In *Caterpillar Inc.*, we upheld the

inclusion of royalty and interest payments made by a foreign subsidiary in the net income calculation of a New Hampshire business filing a combined report. Caterpillar Inc., 144 N.H. at 258-59. There, we noted that these payments "were expenses to the foreign members, deducted on each payor's foreign income tax return . . . [and as such] . . . constituted income to the domestic recipients." *Id.* at 259.

We begin our Commerce Clause analysis with the Supreme Court's decision in *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992). Although the tax system in *Kraft* differs from the one before us, the principles enumerated in that decision are helpful to the resolution here. In *Kraft*, the income of domestic subsidiaries that did not conduct business in Iowa was not taxed, and the in-state parent was permitted to deduct dividends received from them. In contrast, the in-state parent was not permitted to deduct dividends received from its foreign subsidiaries doing business abroad. *Id.* at 74. Noting that "Iowa is not a State that taxes an apportioned share of the entire income of a unitary business," *id.* at 74 n.9, the Court held that the tax system was discriminatory, because, among other things, Iowa taxed neither the income of, nor dividends paid by, domestic members of the unitary group that did not conduct business in the state. *Id.* at 80.

In its analysis, the Court added a footnote that has been the focus of many state court decisions over the past fourteen years. It provides:

> If one were to compare the aggregate tax imposed by Iowa on a unitary business which included a subsidiary doing business throughout the United States (including Iowa) with the aggregate tax imposed by Iowa on a unitary business which included a foreign subsidiary doing business abroad, it would be difficult to say that Iowa discriminates against the business with the foreign subsidiary. Iowa would tax an apportioned share of the

> domestic subsidiary's entire earnings, but would tax only the amount of the foreign subsidiary's earnings paid as a dividend to the parent.
>
> In considering claims of discriminatory taxation under the Commerce Clause, however, it is necessary to compare the taxpayers who are "most similarly situated." A corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad. In the former case, the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary. A more appropriate comparison is between corporations whose subsidiaries do not do business in Iowa.

Id. at 80 n.23 (citation omitted). Thus the Court distinguishes between a single entity filing system where income from out-of-state domestic subsidiaries is not taxed at all and a combined reporting method system where out-of-state domestic income is taxed through apportionment. This distinction has been relied upon by some state courts to uphold ostensibly discriminatory taxation provided a combined reporting method is properly used. *See, e.g., Appeal of Morton Thiokol, Inc.*, 864 P.2d 1175 (Kan. 1993); *Du Pont de Nemours v. State Tax Assessor*, 675 A.2d 82 (Me. 1996).

Distinguishing its taxing system from that in *Kraft*, the Kansas Supreme Court upheld the state's combined reporting tax formula which permitted in-state corporations to deduct dividends received from domestic subsidiaries, but included dividends received from foreign subsidiaries in the calculation of taxable income. *Thiokol*, 864 P.2d at 1185. The court essentially held that this formula effectively "balanc[ed] the [tax] burdens" of each entity and accepted the state's argument that:

> the aggregate tax imposed by [the state] on a unitary business with a domestic subsidiary would not be less

> burdensome than that imposed by [the state] on a unitary business with a foreign subsidiary because the income of the domestic subsidiary would be . . . taxed while only the dividend of the foreign subsidiary would be taxed.

Id. at 1186.

Similarly, in *Du Pont*, the Maine Supreme Judicial Court followed the reasoning of *Thiokol* and upheld an analogous taxing formula. *Du Pont*, 675 A.2d at 83. The court found that by proportionately taxing the income received from domestic subsidiaries and the dividends received from foreign subsidiaries, the state's taxing system "provid[ed] a type of 'taxing symmetry.'" *Id.* at 88. The court further held that "the inclusion of dividends paid by foreign subsidiaries does not constitute . . . facial discrimination against foreign commerce." *Id.*

The *Thiokol* and *Du Pont* courts looked at the overall tax burden placed upon the unitary business to determine whether the general taxing formula discriminated against foreign commerce. *Thiokol*, 864 P.2d at 1186; *Du Pont*, 675 A.2d at 88. Several other courts have upheld the principles outlined in *Thiokol* and *Du Pont*, although some have invalidated taxing regimes as discriminatory for other reasons not applicable here. *See Hutchinson Technology v. Com'r of Revenue*, 698 N.W.2d 1, 17 (Minn. 2005) ("But in contrast to the circumstances in *Morton Thiokol* and *Du Pont*, which involved taxes imposed by the same state for which the dividend-received deduction was intended to compensate, the additional tax liability for which the dividend-received deduction would compensate here is *federal* tax liability"); *Emerson Elec. Co. v. Tracy*, 735 N.E.2d 445, 448-49 (Ohio 2000) (recognizing the validity of the "taxing symmetry" principle where domestic and foreign subsidiaries are both taxed once); *Conoco, Inc. v. Taxation & Revenue Dept.*, 931 P.2d 730, 735 (N.M. 1996) (same), *cert. denied*, 521 U.S. 1112 (1997); *Bernard Egan & Co. v. State, Dept. of Rev.*, 769 So. 2d 1060,

1061 (Fla. Dist. Ct. App. 2000) (upholding similar taxing regime as constitutional because domestic and foreign subsidiary income was equally treated under the consolidated reporting method), *cert. denied*, 534 U.S. 995 (2001); *Caterpillar, Inc. v. C.I.R.*, 568 N.W.2d 695, 701 (Minn. 1997) (adopting similar analysis as applied to foreign interest and royalty payments), *cert. denied*, 522 U.S. 1112 (1998); *Fujitsu IT Holdings v. Franchise Tax Bd.*, 15 Cal. Rptr. 3d 473, 489-90 (Ct. App. 2004) (adopting the "taxing symmetry" principle in *Du Pont*, and upholding a taxing regime which taxed foreign dividend income but excluded dividend income from domestic subsidiaries).

While we recognize that GE does not challenge the state's combined reporting method but rather focuses only upon the alleged disparate treatment between foreign subsidiaries doing business in the state and those that do not, we find the principles of "aggregate tax" burdens and "taxing symmetry" enumerated in these cases helpful to the analysis here. The United States Supreme Court requires analysis of the aggregate tax burden when reviewing a claim that a tax discriminates in violation of the Commerce Clause: "a proper analysis must take the whole scheme of taxation into account." *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 69 (1963) (quotation and citation omitted); *Kraft*, 505 U.S. at 80-81 & n.23 (speaking in terms of the "aggregate tax imposed by [a state] on a unitary business").

Following the reasoning in these cases, we assess New Hampshire's taxing regime as a whole and look at the aggregate tax imposed upon a unitary business. "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981). Viewing RSA 77-A:4, IV not in isolation, but as a part of a larger taxing system, we find no improper discriminatory treatment. For purposes of this appeal, we assume that a foreign

subsidiary conducting business in New Hampshire is subject to the BPT under RSA chapter 77-A and must pay a tax apportioned upon its profits attributable to the state. RSA 77-A:1, IV; RSA 77-A:3, I. Any dividends paid to a parent corporation also located within the state may be deducted pursuant to RSA 77-A:4, IV up to the amount of business profits already taxed. RSA 77-A:4, IV; *First Financial*, 121 N.H. at 385. This ensures that the income of the business entity is taxed only once. *Id.* In contrast, a foreign subsidiary that does not conduct business in the state is not subject to the BPT and its income is therefore not directly taxed. RSA 77-A:1, I. Therefore, any dividends paid to an in-state parent corporation are apportioned and taxed as income; they are not subject to a deduction under RSA 77-A:4, IV because that dividend income has been taxed only once.

Accordingly, the New Hampshire BPT regime contains the type of "taxing symmetry" upheld in *Du Pont* and the "balancing the burdens" formula affirmed in *Thiokol*. Although the in-state parent is not taxed directly in the first example given above, because by nature of the unitary business concept the parent and its subsidiary are considered a single business entity, it follows that the parent ultimately pays the BPT of its subsidiary. *See Concord Inv. Corp.*, 114 N.H. at 109; *Caterpillar Inc.*, 144 N.H. at 259.

Furthermore, by viewing the state's taxing regime as a whole, we conclude that RSA 77-A:4, IV does not facially discriminate by any means offensive to the Commerce Clause. Since both the unitary business with the foreign subsidiary operating in New Hampshire and the unitary business with the foreign subsidiary not operating in New Hampshire are each only taxed once, there is no "differential treatment" that benefits the former and burdens the latter, *Oregon Waste*, 511 U.S. at 99; the latter is not taxed more heavily than the former, *Fulton*, 516 U.S. at 331; and the former is not given a "direct commercial advantage" over the latter, *Boston Stock*

Exchange, 429 U.S. at 329 (quotation omitted). Although the total tax assessed in the end may not be exactly equal, we have noted before that the state's taxation methods need "not apportion income perfectly[;] the Federal Constitution does not require mathematical exactitude, only a rough approximation." *Caterpillar Inc.*, 144 N.H. at 262 (quotations omitted).

In spite of these decisions, GE argues that "[e]very court that has examined dividends received deduction statutes substantially the same as RSA 77-A:4, IV has struck down the provisions as violating the Commerce Clause." GE cites several decisions to support this claim.

In *Dart Industries, Inc. v. Clark*, 657 A.2d 1062 (R.I. 1995), the Supreme Court of Rhode Island invalidated a statutory provision which effectively excluded domestic dividends but required inclusion of foreign dividends in the calculation of a corporation's Rhode Island net income. *Id.* at 1063-64. The court held that the statute contained the same "fatal flaw" as the statute in *Kraft*, and found that "Rhode Island's [taxing regime] treats dividends paid by a foreign corporation less favorably than those paid by domestic corporations." *Id.* at 1066. Similarly, in *D.D.I., Inc. v. State ex rel. Clayburgh*, 657. N.W.2d 228, 231 (N.D. 2003), the court noted that the tax commissioner conceded that the state's dividends received deduction was discriminatory and focused instead upon the commissioner's argument that it was constitutional as a compensatory tax. Therefore, no further analysis was conducted regarding facial discrimination.

In two cases from California, two separate courts of appeal invalidated statutes that permitted a deduction only for dividends paid out of income that had already been subject to tax in the state. *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Ct. App. 2003), *cert. denied*, 540 U.S. 1178 (2004); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d 611 (Ct. App. 2000). But *see Fujitsu IT Holdings*, 15 Cal. Rptr. 3d at 489-90. In *Ceridian*, the Franchise Tax Board

for the State of California (FTB) argued that the provision was not unconstitutional because it "avoids double taxation." *Ceridian*, 102 Cal. Rptr. 2d at 619. The court rejected this argument as inconsequential, since the statute facially discriminated against out-of-state corporations by "favor[ing] domestic corporations over their foreign competitors in raising capital among California corporations." *Id.* at 620. Similarly, in *Farmer Brothers*, the court held that the dividend-received deduction was discriminatory on its face because it "favors dividend-paying corporations doing business in California and paying California taxes over dividend-paying corporations which do not do business in California and pay no taxes in California." *Farmer Bros.*, 134 Cal. Rptr. 2d at 398. The court relied, in part, upon *Fulton*.

In *Fulton*, the Supreme Court held that North Carolina's "intangibles tax" assessed against corporate stock owned by state residents "facially discriminates against interstate commerce." *Fulton*, 516 U.S. at 333. The tax was calculated using a formula that allowed taxpayers who owned stock in in-state corporations, which were subject to tax in North Carolina, to take a limited "percentage deduction equal to the fraction of the issuing corporation's income subject to tax in North Carolina." *Id.* at 328.

We do not agree that these cases require a finding that RSA 77-A:4, IV is discriminatory. *Fulton* is not analogous to the present case because there, the state taxing regime taxed stock ownership and treated in-state stock more favorably than stock held in out-of-state corporations. *Id.* at 333. In the present case, the state is instead taxing a proportionate share of dividend *income* coming into the state. *See generally Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 187-88 (1983) (distinguishing taxing regime which taxed property from regime which taxed income); *Mobil Oil Corp.*, 445 U.S. at 446.

In addition, we do not find the decisions of the California appellate courts and in *Dart* and *D.D.I.* to be persuasive here. While the deduction provisions invalidated in these cases appear similar to the New Hampshire dividend-received deduction at issue, it may be that in those cases, there was no taxing symmetry as there is here. Regardless, we do not agree with their analysis. We also note that a more recent California Court of Appeals decision, which cited *Du Pont*, upheld a limited deduction for dividends received from foreign corporations while allowing a full deduction for dividends received from domestic corporations. *Fujitsu IT Holdings*, 15 Cal. Rptr. 3d at 489.

As stated above, we examine our state taxing regime as a whole, and look at the aggregate tax assessed against the unitary business in New Hampshire. We conclude that RSA 77-A:4, IV does not facially discriminate against a dividend-paying foreign subsidiary that does not conduct business in New Hampshire.

There being no genuine issue of material fact in dispute and the department being entitled to summary judgment as a matter of law, we affirm the trial court's grant of the department's motion for summary judgment. Because we hold that RSA 77-A:4, IV is not unconstitutional on its face, we need not address the compensatory tax issue.

Affirmed in part and reversed in part.

BRODERICK, C.J., and DALIANIS, DUGGAN and GALWAY, JJ., concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE
MERRIMACK, SS. SUPERIOR COURT

No. 04-E-0305

GENERAL ELECTRIC COMPANY, INC.

v.

STANLEY R. ARNOLD, COMMISSIONER OF NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION AND NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

ORDER

Pursuant to RSA 21-J:28-b, IV, General Electric Company, Inc. ("GE") appeals a June 25, 2002 decision of the Commissioner of the New Hampshire Department of Revenue Administration ("DRA") relating to GE's Business Profit Tax ("BPT") filings for the years 1990-1999. GE brings its petition on three counts alleging that DRA's rejection of its claim is erroneous because: (1) the dividends received deduction of RSA 77-A:4, IV, New Hampshire's BPT statute, facially discriminates against foreign commerce in violation of the commerce clause of the United States Constitution; (2) the dividends received deduction of RSA 77-A:4, IV, as applied discriminates against foreign commerce in violation of the commerce clause of the United States Constitution; and (3) the taxation of the dividends paid by GE foreign subsidiaries results in grossly distorted and unfair taxation in violation of the due process clause of the United States Constitution.[1] Before the Court is DRA's Motion to Dismiss

[1] The Court granted GE's Motion for a Voluntary Non-Suit as to Count Three with prejudice.

counts one and two. GE objects and moves to strike DRA's Motion to Dismiss. Also before the Court is GE's Motion for Summary Judgment to which DRA objects and DRA's Motion for Summary Judgment to which GE objects. For the reasons provided below, the Court finds and rules as follows.

I. STANDARD OF REVIEW

> Within 30 days of the notice of decision, the taxpayer may appeal such decision by written application to the board of tax and land appeals. or the superior court, in the county in which the taxpayer resides or has a place of business or resident agent. The board of tax and land appeals or the superior court, as the case maybe, shall hear the appeal de novo. Each party may introduce whatever evidence it believes necessary, limited only by the evidentiary rules of the forum. Legal issues shall be limited to those raised before the commissioner, with the exception that the taxpayer may raise additional legal claims addressing constitutional issues; and either party may raise additional legal claims upon a showing of good cause.

RSA 21-J:28-b, IV.

II. FACTUAL BACKGROUND

GE is a New York corporation with its principal offices located in Fairfield, Connecticut. GE conducts extensive business activities throughout the United States and has a place of business in Somersworth, New Hampshire. Because GE conducts business in New Hampshire, it was required to file a BPT return and pay a New Hampshire BPT.

During the tax years 1990 through 1999, the tax years at issue in this appeal, GE served as a common parent company to several subsidiary corporations that performed various business activities both within and outside the United States. The foreign based subsidiaries had 80 percent or more of their

average payroll and property outside the United States. During each of the tax years, the foreign subsidiaries paid dividends to GE and its U.S. based affiliates, termed as GE's "water's edge group."

GE filed the BPT returns in New Hampshire for each of the tax years at issue, and based those returns upon the combined net income of its water's edge group. DRA required GE to include the dividends that it received from its foreign subsidiaries on its BPT returns.

On September 15, 2001, GE and DRA executed two Settlement Agreements which substantially resolved GE's BPT tax liability for the tax years at issue. The Settlement Agreements resolved all of the disputes between GE and DRA except for a penalty issue and the foreign dividend issue. *See* GE's Appeal at 2.

On June 25, 2002, DRA denied GE's request for a refund of taxes paid with respect to dividends that GE and its affiliates received from their foreign subsidiaries during the tax years 1990 through 1999. The DRA Hearing Officer declined to answer the constitutional challenge that GE raised with respect to RSA 77-A:4, IV. The Hearing Officer's final order provides:

> The relief requested by General Electric regarding the Foreign Dividend Issue for each of the 1990-1999 Tax Years is denied because the Hearing Officer is not empowered to decide whether RSA 77-A:4, IV violates the United States Constitution. This denial is issued without prejudice to the rights of General Electric to present the Foreign Dividend Issue to the Superior Court for determination whether RSA 77-A:4, IV violates the United States Constitution and whether General Electric is entitled to a refund.

GE's Mem. of Law in Supp. of its Mot. for Summ. J. at 9.

Following the June 25, 2002 decision, GE filed this appeal. The sole issue presented on appeal is the foreign dividend issue. *See* GE Appeal at 2. GE has styled the foreign dividend issue as:

> whether the dividend received deduction allowed under RSA 77-A:4, IV should be invalidated because it discriminates against foreign commerce in violation of the Commerce Clause of the United States Constitution and results in unfair taxation out of all proportion to the activities carried on by GE in New Hampshire in violation of the Due Process and Commerce Clauses of the United States Constitution.

Id. GE asserts in its appeal that "[p]ursuant to the Settlement Agreements, the parties have agreed and stipulated that if the Foreign Dividend Issue is resolved in GE's favor, the Department will pay a refund to GE with respect to all of the Tax Years in the aggregate amount of $3,154,738." *Id.* at 3.

III. DRA's MOTION TO DISMISS and GE's MOTION TO STRIKE

A. MOTION TO DISMISS STANDARD

In ruling on a motion to dismiss, the Court must determine "whether the plaintiffs allegations are reasonably susceptible of a construction that would permit recovery." *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, 144 N.H. 626, 628 (2000) (quoting *Miami Subs Corp. v. Murray Family Trust and Kenneth Dash Partnership*, 142 N.H. 501, 516 (1997)). This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. *See Williams v. O'Brien*, 140 N.H. 595, 598 (1995). When the Court tests the pleadings, it "assume[s] the truth of the facts alleged in the plaintiffs pleadings and construes [a]ll reasonable inferences in the light most favorable to him." *Hobin*, 144 N.H. at 628 (citation omitted). Dismissal is appropriate "[i]f the facts as pled cannot constitute a basis for legal relief." *Hobin*, 144 N.H. at

628 (quoting *Buckingham v. R.J. Reynolds Tobacco Co.*, 142 N.H. 822, 825 (1998)).

B. DISCUSSION

DRA moves to dismiss GE's constitutional challenge to RSA 77-A:4, IV on the grounds that GE has not raised a justiciable controversy and that GE has no standing to challenge the constitutionality of RSA 77-A:4, IV. DRA argues that RSA 77-A:4, IV is inapplicable to the way in which GE was subject to taxation in New Hampshire for the tax years at issue. Specifically, DRA maintains that because GE is a unitary business, and RSA 77-A:4, IV applies to affiliated entities, RSA 77-A:4, IV is inapplicable to the facts presented here. Further, DRA asserts that RSA 77-A:4, IV applies only "'Din the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the Internal Revenue Code.'" DRA's Mot. to Dismiss at 3 (citing RSA 77-A:4, IV). Because dividends from GE's foreign subsidiaries are at issue and the applicable section of the Internal Revenue Code excludes foreign corporations, DRA avers that RSA 77-A:4, IV is inapplicable to the way in which GE was taxed in New Hampshire.

GE refers to DRA's arguments for dismissal as "statutory application" arguments and moves the Court to strike those arguments on the bases that: (1) the Settlement Agreements preclude DRA from making the statutory application arguments; (2) DRA failed to preserve the issue during the administrative process; (3) DRA admitted in its answer to its petition that the issue of the constitutionality of RSA 77-A:4, IV applied to GE during the tax years a issue; and (4) DRA should not be permitted to raise the statutory application argument because it is inconsistent with its obligation to administer the tax laws equitably and in good faith.

With respect to whether the Settlement Agreements preclude DRA from making the statutory application argument,

GE maintains that in the Settlement Agreements, the parties agreed that all claims had been settled except the constitutionality of RSA 77-A:4, IV. Therefore, because the statutory application argument does not address the constitutionality of RSA 77-A:4, IV, GE argues that DRA is prohibited from raising that argument here. The Court does not agree.

First, upon review of the Settlement Agreements, the Court observes that although the parties did in fact agree that the constitutionality of RSA 77-A:4, IV remains unsettled, paragraph 5 (A) of the Settlement Agreements contemplates that GE may not be a party-in-interest with respect to determining the constitutionality of RSA 77-A:4, IV. *See* Settlement Agreements, attached to GE's Appeal as Ex. A and B at ¶ 5. Moreover, the Settlement Agreements specifically provides that:

> [t]his Agreement is intended solely to expeditiously resolve the dispute with respect to Taxpayer's business profits tax liability for said periods, and is not, and shall not be construed as, an admission by any party as to the relative merits of any of the legal positions advocated by the parties in this case.

Id. at ¶ 9. In light of the specific language contained in the Settlement Agreements with respect to the parties' position concerning GE's prospective challenge to RSA 77-A:4, IV, the Court finds and rules that the Settlement Agreements do not bar DRA's statutory application argument.

Next, the Court rejects GE's contention that because DRA did not raise the statutory application argument during the administrative proceeding, it is precluded from raising it here. On March 8, 2002, the Audit Division of DRA filed a response to GE's petition, stating, in part, that:

> it should be noted that petitioner [GE] has not received dividends from an [Overseas Business Organization] OBO that has business activity in New Hampshire. The

> claimed discrimination is based entirely upon a hypothetical construct of how New Hampshire might tax the dividends received from a subsidiary with at least 80 percent of its average payroll and property outside the United States but that also had business activity in New Hampshire. 'Challenges to perceived discriminatory taxation must also rest upon concrete proof, not hypothetical scenarios.'

Audit Division Response to Petition at 8-9, attached to DRA's Obj. to GE's Mot. to Strike as Ex. A (citing *Sirrell v. State*, 146 N.H. 364 (2001)). The Audit Division's response, shows that DRA did raise the issue as to whether GE had standing to challenge the constitutionality of RSA 77-A:4, IV. Additionally, the Court notes that GE's appeal of the commissioner's June 25, 2002 decision to the Superior Court is *de novo*. *See* RSA 21-J:28-b, IV. Moreover, RSA 2I-J:28-b, IV provides that "[l]egal issues shall be limited to those raised before the commissioner, with the exception that the taxpayer may raise additional legal claims addressing constitutional issues . . ." Because GE has the right to raise its constitutional claims in this forum without being limited by what it raised in the administrative proceeding, it follows that DRA is well within its bounds to put forth any and all defenses it may have in defeating such claims. Therefore, contrary to GE's assertion, the issues raised at the administrative proceeding do not bar DRA from asserting its statutory application argument here.

Next, GE argues that DRA's answer to GE's appeal precludes DRA from raising its statutory application argument. In its appeal, GE stated in pertinent part:

> As set forth in more detail below, the Foreign Dividend Issue exists and applies to GE in each of the Tax Years. . . Pursuant to the Settlement Agreements, the parties have agreed and stipulated that if the Foreign Dividend Issue is resolved in GE's favor, the Department will pay a

> refund to GE with respect to all the Tax Years in the aggregate amount of $3,154,738.

GE's Appeal at ¶ 11. In its answer, DRA admitted paragraph 11 in its entirety. *See* DRA's Answer at 2. DRA maintains that its admission refers to the Settlement Agreements which state "that the parties agreed that all claims were settled 'with the exception of the constitutionality under the applicable provisions of the United States Constitution of New Hampshire's dividends received deduction, RSA 77-A:4, IV, with respect to foreign dividends.'" DRA's Obj. to GE's Mot. to Strike at 7 (citing Settlement Agreements, attached to GE's Appeal as Ex. A and B at ¶ 3). The parties agreed in the Settlement Agreements that the sole issue presented in this appeal would be the constitutionality of RSA 77-A:4, IV. The Court does not construe DRA's answer to be evasive or restrict it from making the statutory application argument. Rather, its answer merely confirms the issue presented. *See generally* Super. Ct. R. 133. Thus, DRA's acknowledgement of the issue presented in paragraph 11 of GE's appeal does not preclude it from making its statutory application argument.

Further, the Court rejects GE's argument that DRA should not be permitted to raise the statutory application argument because it is inconsistent with its obligation to administer the tax laws equitably and in good faith. As noted above, in the Settlement Agreement, GE admits that it may not be a party-in-interest. Further, on March 2, 2002, the Audit Division of DRA provided GE with notice regarding its potential conflict with challenging the constitutionality of RSA 77-A:4, IV. Additionally, the standards set forth in RSA 21-J:28-b, IV do not preclude DRA from raising such an argument. Although the parties agreed in the Settlement Agreements that the foreign dividend issue remains in dispute, DRA has not forfeited its right to challenge the justiciability of that issue or GE's standing to bring such a claim.

Based on the foregoing, the Court DENIES GE's Motion to Strike.

Because GE's response to the merits of DRA's statutory application argument is more fully articulated in its Reply to DRA's Objection to GE's Motion for Summary Judgment, and DRA raises its statutory application argument in its Objection to GE's Motion for Summary Judgment and in its Surreply to GE's Reply to its Objection to GE's Motion for Summary Judgment, the Court considers the merits of the parties' relevant Summary Judgment Motions to determine whether GE has raised a justiciable question and has standing to litigate the issue that it brings before the Court. Although those arguments are found in the cited summary judgment pleadings, the Court still applies the Motion to Dismiss standard in evaluating the merits of DRA's statutory application argument.

DRA argues that GE does not have standing to challenge the constitutionality of RSA 77-A:4, IV because GE is a unitary business and RSA 77-A:4, IV does not apply and/or affect the way in which GE was taxed in New Hampshire during the applicable tax years. *See* DRA's Obj. to GE's Mot. for Summ. J. at 2. GE counters that DRA's statutory application argument is wrong as a matter of law because "it contradicts the plain meaning and intent of the statute, it ignores state constitutional strictures against double taxation, which . . . [are] the bedrock on which the dividends received deduction is constructed, and it is inconsistent with DRA's current actions in administering the BPT and RSA 77-A:4, IV." GE's Obj. to DRA's Mot. for Summ. J. at 3.

With respect to DRA's contention that there is no situation where RSA 77-A4, IV is operable, the Court observes that in 1986 New Hampshire enacted the water's edge legislation[2] in

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[2] "Water's edge method means the determination of taxable business profits for a group of business organizations conducting a unitary business

which a business entity is either part of a unitary group, and required to file combined reports or is a non-unitary business and files as a separate non-unitary business organization. *See* RSA 77-A:3, I, II, III. In *Caterpillar Inc. v. N.H. Dep't of Revenue Admin.*, 144 N.H. 253, 260 (1999), the New Hampshire Supreme Court states that "[i]n 1986, the legislature adopted the water's edge method, eliminating overseas business organizations from subjection to [business profits tax]." (citing Laws 1986, 153:1). To further illustrate this point, DRA argues that the plain language of RSA 77-A:4, N itself demonstrates that it is inapplicable to the way that GE is taxed in New Hampshire. RSA 77-A:4, IV provides the following limited deduction to corporations that received dividends from qualifying subsidiary corporations:

> In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

In construing whether RSA 77-A:4, IV applies to the way in which GE was taxed, "[t]he starting point in the interpretation of a statute is the language of the statute itself." *Bradley Real Estate Trust v. Taylor, Commissioner*, 128 N.H. 441, 444 (citing *State Employees' Ass'n of N.H. v. Bd. of Trustees*, 120 N.H. 272, 273 (1980). "It is a well-established principle

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by adding their combined net income, the additions and deductions provided in RSA 77-A:4 for members of the group, and apportioning the result as provided in RSA 77-A:3." RSA 77-A:1, XVI.

of statutory construction that all words used should be given their ordinary meaning unless a different meaning is indicated from the context in which they are used." *Dupont v. Chagnon*, 119 N.H. 792, 794 (1979).

DRA maintains that RSA 77-A:4, IV applies only "'[i]n the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the Internal Revenue Code.'" DRA's Mot. to Dismiss at 3 (quoting RSA 77-A:4, IV). Because dividends from GE's foreign subsidiaries are at issue and section 6 of the Internal Revenue Code excludes foreign corporations, *see* 26 U.S.C. § 1504(b)(3), DRA avers that RSA 77-A:4, IV is inapplicable to the way in which GE was taxed in New Hampshire.

GE does not dispute that it is a "unitary"[3] business, and, that it is not an "affiliated" business as referenced in the statute. GE states that "[biased on the express structure of RSA 77-A:4, IV, the 'affiliated group' definition applies to qualify the type of 'parent' that may be eligible for the deduction." GE's Obj. to DRA's Mot. for Summ. J. and GE's Reply to DRA's Obj. to GE's Mot. for Summ. J. at 16. However, GE argues that "affiliated group cannot reasonably be read as a clause that qualifies the reference to 'subsidiary or subsidiaries' because the reference to the federal 'affiliated group' definition occurs in a prepositional phrase that modifies the word 'parent', and is located significantly before the term 'subsidiary' is even used." *Id.* at 17. Notwithstanding GE's contention, even if the federal definition of affiliated group which excludes foreign corporations is not applicable here, GE cannot escape the fact that it is a unitary business that filed a combined return for the tax years at issue and the plain and unambiguous language contained in RSA 77-A:4,

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[3] New Hampshire defines unitary business as "one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions." RSA 77-A:1, XIII.

IV does not specifically address that type of business scenario. Moreover, GE does not contest the fact that its foreign-based subsidiaries that paid dividends to it, were not subject to taxation in New Hampshire.

In construing the plain meaning and/or purpose of RSA 77-A:4, IV, the Court deems it readily apparent from the unambiguous words used in the statute that "[t]he purpose of this deduction is to prevent double taxation", RSA 77-A:4, IV, on "gross business profits [that] have already been subject to taxation under this chapter during the same taxable period." *Id.*

Maurice P. Gilbert, the Director of the Audit Division for DRA, makes the following affidavit statements as to the applicability of RSA 77-A:4, IV to unitary businesses. Mr. Gilbert states:

> [p]rior to 1986 a taxpayer was required to file a separate entity business profit tax return unless granted permission by the Department of Revenue Administration to file business profits tax returns on a combined basis if conducting a unitary business. . . Beginning in 1986 a taxpayer was required by the Department of Revenue Administration to file business profits tax returns on a combined basis if conducting a unitary business.

Aff. of Maurice P. Gilbert, Attached to DRA's Reply to GE's Obj. to DRA's Mot. for Summ J. and DRA's Surreply to GE's Reply to the DRA's Obj. to GE's Mot. for Summ. J. GE counters that "[t]he 'Combined Business Profits Tax Return' provides a specific line item that directs taxpayers to subtract 'Deductible dividends' from gross business profits." GE's Obj. to DRA's Mot. for Summ. J. and GE's Reply to DRA's Obj. to GE's Mot. for Summ. J. at 20. The Corporation Business Profits Tax Return provides in pertinent part:

> In the case of a corporation which is the parent of an affiliated group (pursuant to IRC Chapter 6), enter the

> amount of gross dividends paid to the parent by a subsidiary whose gross business profits have already been subject to taxation under RSA 77-A during the same period.

Corporation Business Profits Tax Return, Line-By-Line Instructions, attached to GE's Obj. to DRA's Mot. for Summ. J. and GE's Reply to DRA's Obj. to GE's Mot. for Summ. J. In response to GE's observation, Mr. Gilbert states that "[t]he reference to RSA 77-A:4, IV in the business profits tax form, as it relates to a unitary business is incorrect and the Department is working toward removing that reference." Aff. of Maurice P. Gilbert, Attached to DRA's Reply to GE's Obj. to DRA's Mot. for Summ J. and DRA's Surreply to GE's Reply to the DRA's Obj. to GE's Mot. for Summ. J.

GE's arguments with respect to the directions on the business profit tax form are not sufficient to defeat the fact that GE files its taxes as a unitary business and its foreign-based subsidiaries have not filed separately in New Hampshire so as to be subject to double taxation. The plain and unambiguous language contained in RSA 77-A:4, IV, provides that the purpose of the statute is to prevent double taxation. This statute comes into play when a parent of an affiliated group is entitled to a deduction if its "gross business profits. . . are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation." RSA 77-A:4, IV. GE admits that its foreign subsidiaries have not been subject to taxation in New Hampshire.

Absent a showing that RSA 77-A:4, IV directly and specifically affects its rights, GE does not have standing to bring this lawsuit. "[A] party has standing to raise a constitutional issue only when his own personal rights have been or will be directly or specifically affected." *See Appeal of Richards*, 134 N.H. 148, 154 (.1991). Accordingly, the Court GRANTS DRA's Motion to Dismiss.

However, even assuming *arguendo* that GE has standing to bring this lawsuit, GE fails to demonstrate how RSA 77-A:4, IV is unconstitutional.

GE argues that it is entitled to summary judgment because RSA 77-A:4, IV discriminates on its face against interstate and foreign commerce in violation of the United States Commerce Clause. Further, GE argues that RSA 77-A:4, IV cannot be defended as a valid compensatory tax. DRA counters that GE has not demonstrated that RSA 77-A:4, IV systematically overtaxes foreign corporations or taxes foreign commerce more heavily than domestic commerce. DRA goes on to say that "the circumstances under which the dividend received deduction is allowed is if the dividend is paid by a non-unitary domestic subsidiary conducting business in New Hampshire." *Id.* Further, DRA avers "[i]f the non-unitary dividend-paying subsidiary did not conduct business in New Hampshire, then it would not be subject to tax at all, and of course, the dividend received deduction would not be invoked because the entire statute would be inapplicable, for lack of dividends being subject to tax in the first instance." *Id.* Thus, DRA maintains RSA 77-A:4, IV does "not apply to the factual scenario alleged by GE because the petitioner did not have a subsidiary which filed as a separate entity during the Tax Years, nor did it have a subsidiary subject to . . . double taxation." DRA's Reply to GE's Obj. to DRA's Mot. for Summ. J. at 2. DRA also maintains that even if RSA 77-A:4, IV discriminates against the commerce clause, it is a valid compensatory tax.

RSA 77-A:4, IV, provides:

> In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross busi-

> ness profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

The Commerce Clause of the Federal Constitution provides that "the Congress shall have power to . . . regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. "It has long been understood as well 'to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.'" *Caterpillar Inc.*, 144 N.H. at 257 (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 98 (1994)).

> A state tax affecting interstate or foreign commerce violates the Commerce Clause if it: (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State.

Id. (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). "Additionally, a tax affecting foreign commerce must not create an 'enhanced risk of multiple taxation', *id.* (quoting *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979)), or unduly interfere with the Federal Government's ability to 'speak with one voice' in matters of international commerce." *Id.* at 257-58 (quoting *Japan Line Ltd.* 441 U.S. at 449). "The party challenging the constitutionality of a state tax bears the burden of proving discrimination." *Id.* at 258 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). "'In order to prove that a state tax statute violates the commerce clause, the taxpayer need not show the extent of disparate tax treatment or demonstrate a minimal level of discriminatory effect; the taxpayer need only

prove discrimination against commerce.'" *Id.* (quoting *Smith v. N.H. Dept of Revenue Admin.*, 141 N.H. 681, 693 (1997)).

GE maintains that while its foreign subsidiaries paid dividends to its parent company in New Hampshire, DRA unlawfully denied its request to deduct those dividends. GE asserts that if its foreign subsidiaries had conducted business in New Hampshire and had filed a separate BPT return, then those foreign subsidiary dividends would have been eligible for the dividend received deduction under RSA 77-A:4, IV. GE argues that the "inextricable link between eligibility for the dividend received deduction and the location and taxability of the payor subsidiary in New Hampshire results in unlawful discrimination under the Commerce Clause." GE's Obj. to DRA's Mot. for Summ. J. at 7.

"When a business operates in more than one jurisdiction, its income must be apportioned among those jurisdictions and each State must determine its share of the income." *Caterpillar Inc. v. N.H. Dep't of Revenue Admin.*, 144 N.H. 253, 255 (1999) (citation omitted). "The Federal Constitution does not impose a particular method upon the States in making this determination." *Id.* "Under the apportionment method, the state considers the income generated by all of the corporation's activities, out-of-state, as well as in-state, and then apportions a share of such income to the taxing state by means of a formula that compares the taxpayer's in-state activities to all of its activities." *Id.* at 256 (quoting Hellerstein, *State Taxation of Corporate Income From Intangibles: Allied Signal and Beyond*, 48 Tax L. Rev. 739, 745 (1993)).

The *Caterpillar* Court described New Hampshire's apportionment method as follows:

> First, the combined net income of the domestic members of the unitary business group is determined (water's edge net income). *See* RSA 77-A:1, XIII, :2-b. Then the three apportionment factors of property, payroll, and sales are

> calculated to determine the percent of the group's net income attributable to the State for taxation. *See* RSA 77-A:3, I. The property factor is determined by dividing the value of the taxpayer's New Hampshire real and personal property (the numerator) by the value of the real and personal property of the water's edge group (the denominator). *See* RSA 77-A:3, 1(a). The payroll and sales factors are similarly calculated. *See* RSA 77-A:3, I(b), (c). The property, payroll, and sales of the foreign members are not considered in calculating the factors. *See* RSA 77-A:1, XV, XVI. The three resulting percentages are averaged by combining them and dividing the total by three. *See* RSA 77-A:3, II(a). This figure is the apportionment percentage, which is multiplied by the water's edge net income, the product of which is the amount of business profits that New Hampshire may tax. *See generally* RSA 77-A: 1 , XVI, :2-b, :3.

Id. at 256-57.

In *Caterpillar Inc., the New Hampshire Supreme Court* rejected a constitutional challenge to RSA 77-A:3, in which the plaintiffs argued that "if the foreign subsidiaries' 'income' is included in the calculation of the total apportionable income, their property, payroll, and sales factors, which generated such income, must also be included."[4] 144 N.H. at 258. The Court concluded that the "nature of the water's edge formula

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[4] The Court opined that:

> [i]n 1986, the legislature adopted the water's edge method, 'eliminating overseas business organizations from subjection to [business profits tax]'. Laws 1986, 153:1, *supra*. Accordingly, while the foreign members' apportionment factors are excluded from the calculation of taxable business profits, their income is exempt from State business profits taxation. Royalty and interest payments by the foreign members to domestic members are included as income of the waters edge group.

Id. at 260 (citation omitted).

requires that foreign subsidiaries be treated differently from domestic subsidiaries: most significantly, the latter's income is subject to taxation while the former's income is not." *Id.* at 261-62. The Court went onto to say that "[a]lthough New Hampshire's unitary apportionment formula may not apportion income perfectly, the Federal Constitution does not require 'mathematical exactitude,' only a 'rough approximation.'" *Id.* at 262 (citing *Illinois Cent. R. Co. v. Minnesota*, 309 U.S. 157, 161 (1940)).

In a similar case to the one presented here, the United States Supreme Court considered whether Iowa's corporate taxing scheme violates the Foreign Commerce Clause. *See Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992). The Iowa tax under scrutiny in *Kraft* allowed "a deduction for dividends received from domestic subsidiaries, but not for those received from foreign subsidiaries." *Id.* at 74. The Iowa tax did "not directly tax the income of a subsidiary unless the subsidiary, itself, . . . [did] business in Iowa." *Id.* Further, under this tax, "if a domestic subsidiary transacts business in Iowa, its income is taxed, but if it does not do business in Iowa, neither its income nor the dividends paid to its parent are taxed." *Id.* However, "[i]n the case of the foreign subsidiary doing business abroad, Iowa does not tax the corporate income, but does tax the dividends paid to the parent." *Id.* To avoid multiple taxation, the Iowa tax "allows a deduction for dividends received from a foreign subsidiary if the dividends reflect business activity in the United States." *Id.* at 77. "[W]hile the dividends of all domestic subsidiaries are excluded from the Iowa tax base, the dividends of foreign subsidiaries are excluded only to the extent they reflect domestic earnings." *Id.* The Court rejected Iowa's and *amicus* United States' argument that the Iowa tax scheme was constitutionally valid because unlike a foreign subsidiary, a subsidiary located within the United States would be subject to taxation by the

Federal Government and another State. *See id.* at 80. The Court opined that even though the tax burden to a subsidiary within the United States may be greater than tax burden of a foreign subsidiary, "the fact remains that Iowa imposes a burden on foreign subsidiaries that it does not impose on domestic subsidiaries." *Id.* Notably however, the Court stated that "[i]f one were to compare the aggregate tax imposed by Iowa on a unitary business which included a subsidiary doing business throughout the United States (including Iowa) with the aggregate tax imposed by Iowa on a unitary business which included a foreign subsidiary doing business abroad, it would be difficult to say that Iowa discriminates against the business with the foreign subsidiary." *Id.* at 80, n. 23.

In *E.I. Dupont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82, 83 (Me. 1996), a unitary taxpayer brought a United States Commerce Clause and Due Process Clause challenge to Maine's tax statute on the basis that it included dividends paid by foreign and unitary sources in calculating the taxpayer's taxable income. In distinguishing Maine's taxing scheme from the Iowa's taxing scheme found unconstitutional in *Kraft*, the Court noted that Maine uses a combined reporting method, while Iowa uses a single entity reporting system. *See id.* at 87. The Court went on to note that:

> [p]ursuant to single entity reporting only the values of a single business's activities within the state are reflected in the taxpayer's tax base. The taxing authority carves out from the taxpayer's overall business those activities taking place in, the property employed in, and the income derived from sources within a single state to determine the income attributable to the state. The various subsidiaries of a multijurisdictional enterprise are viewed as separate from one another and the income of the affiliates that do not do business in the state are not considered in the income of the 'single entity.'

Id., n. 9 (citing Jerome R. Hellerstein & Walter Hellerstein,

State and Local Taxation 432 (4th ed. 1978)). Under Iowa's taxing single entity taxing method, Iowa "directly taxed neither the income nor dividends of a domestic subsidiary if the subsidiary did not do business within the state." *Id.* "Iowa, however, did tax the dividends paid by the foreign subsidiary to the domestic parent." *Id.* Maine's taxing scheme, however, "effectively captures some of the value of the business activity of the domestic subsidiaries by directly taxing an apportioned part of the domestic subsidiary's income." *Id.* "Having captured this value, the Assessor does not add the domestic subsidiary's dividends back into the apportioned income." *Id.* Similar to New Hampshire's water's edge combined reporting method, "Maine's use of the water's edge combined reporting method limits the State to the nation's boundaries in calculating corporate income, and hence no income of foreign subsidiaries is apportioned in Maine." *Id.* In Maine, "[t]he Assessor adds the dividends paid by the foreign subsidiaries to the domestic parent because these dividends represent value earned by the parent that is not otherwise captured." *Id.* at 87-88. The Maine Supreme Court held that "[f]ar from discriminating against foreign commerce, Maine's water's edge combined reporting method provides a type of 'taxing symmetry' that is not present under the single entity system." *Id.* at 88. The Court reasoned that:

> [because the income of the unitary domestic affiliates is included, apportioned, and ultimately directly taxed by Maine as part of the parent company's income, the inclusion of dividends paid by foreign subsidiaries does not constitute the kind of facial discrimination against foreign commerce that caused the Supreme Court to invalidate Iowa's tax scheme in *Kraft*.]

Id.

Unlike Iowa's single entity filing method found to be unconstitutional in Kraft, under New Hampshire' water's edge method, the foreign based dividend is apportioned and added

to the aggregate of the unitary group in New Hampshire, and the unitary group is required to file combined reports as a whole. *See* RSA 77-A:3, I, II, III. Consistent with the reasoning in *E.I. Dupont,* the Court finds here that because GE is a unitary business subject to New Hampshire's water's edge method, and is not subject to taxation under RSA 77:4, IV, GE has failed to demonstrate how RSA 77:4, IV discriminates against foreign commerce.

Additionally, "'[i]n considering claims of discriminatory taxation under the Commerce Clause, it is necessary to compare the taxpayers who are most similarly situated.'" *Caterpillar Inc.*, 144 N.H. at 259 (quoting *Kraft*, 505 U.S. at 80 n.23).[5] In *Kraft*, the Court stated that "[a] corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad." 505 U.S. at 80, n.23. The Court went onto to say that "[i]n the former case, the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of a foreign subsidiary." *Id.* "A more appropriate comparison is between corporations whose subsidiaries do not do business in Iowa" *Id.* Thus, a New Hampshire corporation that has a subsidiary in New Hampshire is not similarly situated to a New Hampshire corporation with a subsidiary doing business abroad. While the former is subject to taxation in New Hampshire, the latter is not. Under RSA 77-A:4, IV all New Hampshire based and non-New Hampshire based subsidiaries are on equal footing.

Under RSA 77-A:4, IV, New Hampshire based subsidiaries which pay taxes in New Hampshire are entitled to the dividend-received deduction. All non-New Hampshire based sub-

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[5] The Court notes that as per its reference to Chapter 6 of the United States Internal Revenue Code, RSA 77-A:4, IV only applies parent companies that have at least 80 percent of the outstanding stock of a subsidiary.

sidiaries, whether foreign or domestic that have a parent in New Hampshire, and that pay taxes and dividends to the parent are not entitled to the dividend received deduction under RSA 77-A:4, IV. Rather, foreign dividends are apportioned and added to the amount of New Hampshire unitary taxable business profits. RSA 77-A:3, I, II. RSA 77-A:4, IV does not offer a deduction for dividends paid by foreign subsidiaries and does not constitute the kind of facial discrimination at issue in *Kraft*.

For the reason provided above, the Court finds and rules the RSA 77-A:4, IV does not discriminate against foreign commerce and therefore, does not violate the United States Commerce Clause. Accordingly, the Court DENIES GE's Motion for Summary Judgment and GRANTS DRA's Motion for Summary Judgment.

So Ordered.

Dated:_____ _____

EDWARD J. FITZGERALD III,
Presiding Justice

APPENDIX C

THE STATE OF NEW HAMPSHIRE
MERRIMACK, SS. SUPERIOR COURT

No. 04-E-0305

GENERAL ELECTRIC COMPANY, INC.

v.

STANLEY R. ARNOLD, COMMISSIONER OF NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION AND NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

ORDER

Before the court is a Motion for Reconsideration, filed by General Electric Company ("GE") pursuant to Superior Court Rule 59-A, requesting that this Court clarify and reconsider its August 18, 2005 Order, in which it granted the New Hampshire Department of Revenue Administration's ("DRA's") Motion to Dismiss. Specifically, GE requests clarification and reconsideration on the following three points: (1) That this Court should reconsider its holding that GE lacks standing to bring a constitutional challenge against RSA 77-A:4, IV; (2) Whether this Court held that dividends paid by a foreign subsidiary, which does business in New Hampshire and consequently pays Business Profit Tax ("BPT"), would or would not be eligible for the dividends received deductions ("DRDs") under RSA 77-A:4, IV; and (3) That this Court should reconsider its statement that "GE does not dispute. . . that it is not an 'affiliated' business as referenced in the statute." The DRA objects. Upon review of the parties' pleadings and the applicable law, the Court finds and rules as follows.

Procedural History

By way of brief background, the court notes the following relevant facts. GE initiated the instant action in Strafford County Superior Court in 2002, pursuant to RSA 21-J:28-b, IV, seeking to appeal a DRA decision regarding the collection of taxes. GE and the DRA had previously entered into a settlement agreement (the "Agreement") which resolved all disputes arising from the DRA's decision, with the exception of the issue surrounding foreign dividends. Specifically, GE claimed that the allowance of DRDs under RSA 77-A:4, IV, effectively discriminates against foreign commerce, and/or results in double taxation in violation of the Commerce and Due Process Clauses of the United States Constitution. The DRA objected and both parties filed extensive motions.

In an Order dated July 21, 2004, this Court determined that in the interests of judicial economy, the parties should seek an interlocutory transfer of the issue to the Supreme Court for resolution. However, after much effort, the parties were unable to agree on a single interlocutory statement. On April 18, 2005, this Court determined that the Supreme Court was unlikely to accept the appeal, due to the parties' lack of agreement concerning the issue for interlocutory transfer, and instead resolved to respond to the pending motions for dismissal and summary judgment.

On August 18, 2005, upon review of the pending motions, this Court denied GE's motion for summary judgment, as well as its motion to strike the DRA's statutory application argument. The DRA's motions to dismiss and for summary judgment were granted. GE has now filed a motion for reconsideration and clarification of that Order. The Court addresses each of GE's points in turn.

(1) Whether GE Lacks Standing to Bring a Constitutional Challenge Against RSA 77-A:4, IV

GE argues this Court's conclusion that GE lacks standing to bring a constitutional challenge against RSA 77-A:4, IV, is wrong as a matter of law. In support of this contention, GE argues that (1) GE paid taxes on dividends received from its foreign subsidiaries, and; (2) the DRA denied GE's request for a refund relative to those dividends. As such, GE asserts that it has suffered an injury in fact under an unconstitutional state taxing scheme which allows for DRDs to domestic subsidiaries but not to foreign subsidiaries. Moreover, GE contends that:

> [C]itizens who pay tax have a direct stake in seeing that the Federal Constitution's prohibition against discriminatory taxation is enforced by our courts. If the Court's standing position were correct, then the only citizens who could challenge discriminatory state tax schemes would be those who had benefited from the scheme. Citizens who suffer discriminatory taxation could not mount a legal challenge. Such a holding would turn the Commerce Clause's protection against discriminatory state taxation upside down.

GE's Mot. for Reconsideration and Clarification, Doc. 66, ¶ 14.

Contrary to GE's argument, however, whether a party is benefited from the tax scheme is not the basis for determining standing. Rather, "a party's standing to bring suit is a question of subject matter jurisdiction. . . . The plaintiff[ ] lack[s] standing because [it] cannot raise the constitutional issues of another. The general rule is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected." *Hughes v. N.H. Division of Aeronautics*, 152 N.H. 30, 35 (2005). In this instance, standing is conferred based upon whether the challenged statute is applicable to the way in which GE was taxed.

Here, it is undisputed that GE is a unitary business. As such, GE filed a combined report which was subject to the apportionment method described in RSA 77-A:3. *See* RSA 77-A:3, III ("When 2 or more related business organizations are engaged in a unitary business . . . a part of which is conducted in this state . . . the income attributable to this state shall be determined by means of the combined apportionment factors of the unitary business group in accordance with paragraphs I and II."). RSA 77-A:3, II, prescribes its own method of accounting for foreign dividends from unitary sources.

In contrast, RSA 77-A:4, IV states:

> *In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code* as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

(emphasis added). Chapter 6 of the United States Internal Revenue Code excludes dividends from foreign corporations. *See* 26 U.S.C. § 1504(b)(3). Thus, under the plain and unambiguous language of RSA 77-A:4, IV, it does not apply to a parent company, such as GE in the instant case, which receives dividends from a foreign corporation. Moreover, under the plain and unambiguous language of RSA 77-A:4, IV, its express purpose is to prevent double taxation. In this case, it is undisputed that GE's foreign based subsidiaries did not conduct any business in the state during the tax years at issue and that they have not been subject to taxation in New Hampshire as separate filers. *See GE's Mot. for Summ. J., Doc. 15, p. 6, fn. 8.* Because double taxation did not occur, it follows

that RSA 77-A:4, IV was not invoked. For these reasons, GE, as a unitary group, could not have invoked RSA 77-A:4, IV, and, consequently, lacks standing to challenge its constitutionality. Accordingly, the Court DENIES GE's Motion for Reconsideration on the Issue of Standing.

(2) Whether RSA 77-A:4, IV, is Applicable to a Foreign Subsidiary Doing Business in New Hampshire and Paying BPT

GE requests that this Court clarify its holding as to whether dividends paid by a foreign subsidiary, which does business in New Hampshire and pays BPT, would be eligible for DRDs under RSA 77-A:4, IV. Specifically, GE argues that its' foreign subsidiaries paid dividends but were denied the ability to deduct those dividends by the DRA. GE asserts that if its foreign subsidiaries had conducted business in New Hampshire and had filed a separate BPT return, then those foreign subsidiary dividends would have been eligible for the DRDs under RSA 77-A:4, IV. Thus, according to GE, this prohibition against allowing DRDs to a foreign subsidiary, doing in business in New Hampshire and paying BPT, results in an unconstitutional double taxation scheme. Moreover, GE asserts that any such prohibition against allowing DRDs to foreign subsidiaries, while still allowing DRDs to domestic subsidiaries, would unconstitutionally discriminate against foreign commerce.

At the outset, the Court notes that GE lacks standing to bring a constitutional challenge against RSA 77-A:4, IV, because it is a unitary group which files a combined report and is subject to apportionment under RSA 77-A:3. Moreover, GE has not asserted that it has foreign subsidiaries who did business in New Hampshire and paid BPT, making it unnecessary for this Court to make findings as to whether dividends paid by a foreign subsidiary, doing business in New Hampshire and paying BPT, would be eligible for DRDs under RSA 77-A:4, IV. GE argues that this question is critical to its

argument, however, this Court disagrees. Any challenge to the constitutionality of RSA 77-A:4, IV, would need to be made by a party with standing in this case a foreign subsidiary doing business in New Hampshire and paying BPT under the separate filing regime. Thus, because RSA 77-A:4, IV, is inapplicable to GE's taxing scenario, the Court declines to address its constitutionality at this time. Accordingly, GE's Motion for Clarification is DENIED.

(3) Whether GE Disputes that its Subsidiaries are Affiliated Under the Statute

In this Court's original Order, it stated that "GE does not dispute that it is a 'unitary' business, and, that it is not an 'affiliated' business as referenced in the statute." *General Electric Inc. v. Stanley Arnold, Commissioner of N.H. Dept. of Revenue Administration and N.H. Dept. of Revenue Administration*, Merrimack County Superior Court, No. 04-E-0305, August 18, 2005 (Order, Fitzgerald, J.). GE argues that it has never conceded that its foreign subsidiaries are not "affiliated" under RSA 77-A:4, IV, and that this Court should reconsider that statement. Although this Court found and continues to find that foreign subsidiaries are excluded under the term "affiliated" within RSA 77-A:4, IV, the Court notes that GE did indeed dispute whether its foreign subsidiaries are "affiliated" under the terms of RSA 77-A:4, IV. Accordingly, the Court GRANTS GE's Motion to Reconsider for the limited purpose of reflecting that GE disputes that its foreign subsidiaries are not affiliated under RSA 77-A:4, IV.

So ORDERED.

Dated:_____

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EDWARD J. FITZGERALD III,
Presiding Justice

APPENDIX D

THE STATE OF NEW HAMPSHIRE
STRAFFORD, SS. SUPERIOR COURT

GENERAL ELECTRIC COMPANY, INC.

v.

STANLEY R. ARNOLD, COMMISSIONER OF NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION AND NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

APPEAL PURSUANT TO RSA 21-J:28-b, IV

General Electric Company, Inc. ("GE") appeals a decision of the Commissioner of the Department of Revenue Administration pursuant to RSA 21-j:28-b, IV.

PARTIES

1. GE is a corporation organized under the laws of the State of New York with principal executive offices located at 3135 Easton Turnpike, Fairfield, Connecticut.

2. The New Hampshire Department of Revenue Administration (the "Department") is an agency of the State of New Hampshire responsible for overseeing the collection of taxes. Stanley R. Arnold, Jr. is the Commissioner of the Department.

JURISDICTION AND VENUE

3. The Court has jurisdiction to "hear the appeal *de novo*" pursuant to RSA 21-J:28-b, IV.

4. GE has a place of business in Somersworth, County of Strafford, State of New Hampshire, and venue therefore is properly laid in this court pursuant to RSA 21-J:28-b, IV.

PROCEDURAL BACKGROUND ON THE DEPARTMENT'S ACTIONS

5. The tax years at issue in this appeal are 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, and 1999 ("the Tax Years").

6. GE filed business profits tax ("BPT") returns for each of the Tax Years ("GE's BPT Returns"), and the Department conducted an examination of GE's BPT Returns.

7. On September 5, 2001, GE and the Department executed two settlement agreements substantially resolving GE's BPT liability for the Tax Years as described in two agreements (the "Settlement Agreements") attached to this petition. The Settlement Agreement for the tax years 1987 to 1995 is attached at Exhibit A and the Settlement Agreement for the tax years 1996 to 1999 is attached at Exhibit B.

8. The Settlement Agreements resolved all disputes arising from the examination, except two issues: the "Penalty Issue" and the "Foreign Dividend Issue." The sole issue presented in this appeal is the "Foreign Dividend Issue."

9. The Foreign Dividend Issue is whether the dividends received deduction allowed under RSA 77-A:4, IV should be invalidated because it discriminates against foreign commerce in violation of the Commerce Clause of the United States Constitution and results in unfair taxation out of all proportion to the activities carried on by GE in New Hampshire in violation of the Due Process and Commerce Clauses of the United States Constitution.

10. RSA 77-A:4, IV (the "Dividends Received Deduction") generally permits a parent corporation to deduct dividends received from a subsidiary company that conducts business within New Hampshire and that accordingly files a BPT return. RSA 77-A:4 does not allow any deduction for dividends received from a subsidiary company that does not

conduct business within New Hampshire and does not file a BPT return. RSA 77-A:4, IV.

11. As set forth in more detail below, the Foreign Dividend Issue exists and applies to GE in each of the Tax Years. Pursuant to the Settlement Agreements, the parties have agreed and stipulated that GE timely filed all returns, requests for refunds, and petitions for redetermination and reconsideration requesting the Department to, among other things, determine the Foreign Dividend Issue in GE's favor and calculate GE's BPT liability in accordance with such determination. Pursuant to the Settlement Agreements, the parties have agreed and stipulated that if the Foreign Dividend Issue is resolved in GE's favor, the Department will pay a refund to GE with respect to all of the Tax Years in the aggregate amount of $3,154,738.

12. On June 24, 2002, the Department's Hearing Officer issued an order that consolidated numerous existing administrative dockets affecting the Tax Years in order to address the Foreign Dividend Issue for the Tax Years in one administrative docket.

13. Additionally, on June 24, 2002, the Hearing Officer granted a joint motion of GE and the Department waiving formal adjudication by the Hearing Officer of the Foreign Dividend Issue for the Tax Years contained in the consolidated administrative docket because the Hearing Officer is not empowered to decide whether a New Hampshire statute violates provisions of the New Hampshire Constitution or the United States Constitution.

14. The Hearing Officer's "Final Order," transmitted to GE by certified mail in a letter dated June 25, 2002, indicated that "the only legal issue presented involves the constitutionality of RSA 77-A:4, IV, and as the Department's Hearing Officer, I am not empowered to decide whether a statute violates the New Hampshire Constitution or the United States

Constitution." Therefore, the Hearing Officer's final order indicated that:

1. The relief requested by General Electric regarding the Foreign Dividend Issue for each of the 1990-1999 Tax Years is denied because the Hearing Officer is not empowered to decide whether RSA 77-A:4, IV violates the United States Constitution. This denial is issued without prejudice to the rights of General Electric to present the Foreign Dividend Issue to the Superior Court for determination whether RSA 77-A:4, IV violates the United States Constitution and whether General Electric is entitled to a refund.

2. As provided in RSA 21-J:28-b, IV, General Electric may appeal this order within 30 days to the Board of Tax and Land Appeals or the Superior Court. If General Electric does not take an appeal within the time required by statute, the denial of relief shall become final.

15. The Hearing Officer's "Final Order" denies the relief requested by GE regarding the Foreign Dividend Issue with respect to the Tax Years.

FACTS CONCERNING THE DEPARTMENT'S ERRONEOUS AND UNCONSTITUTIONAL TREATMENT OF THE FOREIGN DIVIDEND ISSUE

16. During the Tax Years, GE was the parent company of a group of companies that operated various businesses both within and without the United States.

17. During the Tax Years, GE conducted portions of its businesses in foreign (non-United States) markets through certain subsidiaries that did not carry on any business within New Hampshire or any other part of the United States (the "GE Foreign Subsidiaries").

18. The BPT Statute generally requires a taxpayer to determine its BPT liability based on the "combined net income" of those business organizations that are engaged in the conduct of a unitary business, except for "overseas business organizations." RSA 77-A:2-b; RSA 77-A:1, XV. The BPT Statute defines "overseas business organizations" ("OBOs") as "business organizations with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia." RSA 77-A:1, XIX. The exclusion of OBOs creates a group of domestic (United States) business organizations which is referred to in the BPT Statute as a "water's edge combined group." RSA 77-A:1, XV. An OBO that carries on any business activity within New Hampshire is taxable as an entity separate from the other organizations with which it is engaged in a unitary business and must file a separate BPT return. RSA 77-A:1, I.

19. For each of the Tax Years, GE filed BPT returns reflecting the combined net income of those business organizations comprising its "water's edge combined group." These returns excluded the income of the GE Foreign Subsidiaries.

20. For each of the Tax Years, the GE Foreign Subsidiaries were not required to file a separate BPT return because they were not carrying on business within New Hampshire.

21. During the Tax Years, the GE Foreign Subsidiaries paid substantial dividends to their domestic (United States) parent corporations that were members of the GE water's edge combined group.

22. In denying GE's petitions for redetermination and reconsideration, the Department rejected GE's claim that it was entitled to deduct the amount of such foreign dividends in computing GE's combined net income for purposes of the BPT Statute.

BASES FOR APPEAL

COUNT ONE

The Department's Rejection of GE's Claim is Erroneous Because the Dividends Received Deduction of the New Hampshire Business Profits Tax Statute Facially Discriminates Against Foreign Commerce in Violation of the Commerce Clause of the United States Constitution.

23. GE incorporates by reference paragraphs 1 through 22 as if fully set forth herein.

24. Under the BPT Statute, whether GE is allowed to deduct dividends paid by a GE Foreign Subsidiary depends solely on whether the GE Foreign Subsidiary carries on business activity within New Hampshire. If it does, then it is required to file a separate BPT return, and GE is permitted to deduct the dividends under RSA 77-A:4, IV. If it does not, then it is not required to file a separate BPT return, and GE is not permitted to deduct the dividends.

25. Accordingly, RSA 77-A:4, IV establishes a regime that allows preferential deduction treatment of foreign dividends paid by foreign subsidiaries only to the extent that the foreign subsidiaries carry on business activity within New Hampshire.

26. This Dividends Received Deduction regime draws an express facial statutory distinction between a business with foreign subsidiaries that carry on business activity within New Hampshire and a business with foreign subsidiaries that do not carry on business activity within New Hampshire.

27. The Business Profits Tax Statute, through its Dividends Received Deduction, favors businesses that locate some property and business activity of foreign unitary subsidiaries in New Hampshire over businesses that do not locate property and business activity of foreign unitary subsidiaries in New Hampshire.

28. During the Tax Years, GE's Foreign Subsidiaries did not have any property or business activities located within New Hampshire, and accordingly GE was denied the right to receive non-discriminatory application of the Dividends Received Deduction with respect to dividends paid by the GE Foreign Subsidiaries.

29. The BPT Statute therefore facially discriminates against foreign commerce in violation of the Commerce Clause of the United States Constitution. *See Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996)(invalidating North Carolina's intangibles tax deduction based on the extent to which a corporation conducted business within North Carolina); *NCR Corp. v. Wisconsin Dep't of Rev.*, Wisc. Cis. Ct., Dane County, No. 92 CV 1525 (1993)(invalidating Wisconsin's "concentration statute" deduction for dividends received from subsidiaries with at least 50% of their net income from Wisconsin); *Ceridian Corp. v. Franchise Tax Bd.*, No. A084298 (December 21, 2000)(California's deduction for dividends received by commercially domiciled parents from insurance subsidiaries subject to the California insurance premiums tax unlawfully discriminates against interstate commerce); *Farmer Bros. Co. v. Franchise Tax Bd.*, No. BC237663 (Superior Court of California, County of Los Angeles November 21, 2001)(California's general dividends received deduction unlawfully discriminates against interstate commerce); *DDI, Inc. v. State of North Dakota*, No. 08-01-C-2879 (South Central Judicial District Court of North Dakota, County of Burleigh June 6, 2002)(North Dakota's dividends received deduction unlawfully discriminates against interstate commerce).

30. The Foreign Dividend Issue presents an issue of fundamental importance to the nation's economy and the fair and consistent application of state tax laws to global commerce.

31. Because the BPT Statute's Dividends Received Deduction unlawfully discriminates against foreign commerce, it

violates the Foreign Commerce Clause of the United States Constitution, and the Department's assessments of tax with respect to payments of dividends by GE's Foreign Subsidiaries should be rejected.

32. Wherefore, GE respectfully requests this Court declare that RSA 77-A:4, IV unlawfully discriminates against foreign commerce in violation of the Foreign Commerce Clause of the United States Constitution, and order the Department to pay the required and stipulated refund of taxes attributable to the unlawful taxation of dividends paid by the GE Foreign Subsidiaries.

COUNT TWO

The Department's Rejection of GE's Claim is Erroneous Because the Dividends Received Deduction of the New Hampshire Business Profits Tax Statute As Applied Discriminates against Foreign Commerce in Violation of the Commerce Clause of the United States Constitution.

33. GE incorporates by reference paragraphs 1 through 32 as if fully set forth herein.

34. In addition to the facial discrimination alleged in Count One, the Dividends Received Deduction, as applied to GE, the GE Foreign Subsidiaries and the dividends paid by the GE Foreign Subsidiaries, discriminates against foreign commerce in violation of the Foreign Commerce Clause of the United States Constitution.

35. Wherefore, GE respectfully requests this Court declare that RSA 77-A:4, IV unlawfully discriminates against foreign commerce in violation of the Foreign Commerce Clause of the United States Constitution, and order the Department to pay the required and stipulated refund of taxes attributable to the unlawful taxation of dividends paid by the GE Foreign Subsidiaries.

COUNT THREE

The Department's Rejection of GE's Claim is Erroneous Because the Taxation of the Dividends Paid By GE's Foreign Subsidiaries Results in Grossly Distorted and Unfair Taxation in Violation of the Due Process and Commerce Clauses of the United States Constitution.

36. GE incorporates by reference paragraphs 1 through 32 as if fully set forth herein.

37. The dividends paid by the GE Foreign Subsidiaries are derived solely from activities conducted outside of New Hampshire.

38. Taxation of such dividends pursuant to the BPT Statute results in the grossly unfair and distorted overstatement of GE's income that is out of proportion to its business activities within New Hampshire.

39. Wherefore, GE respectfully requests this Court declare that taxation of the foreign dividends paid by the GE Foreign Subsidiaries pursuant to the BPT Statute results in grossly distorted and unfair taxation in violation of the Due Process and Commerce Clauses of the United States Constitution, and order the Department to pay the required and stipulated refund of taxes attributable to the unlawful taxation of dividends paid by the GE Foreign Subsidiaries.

RELIEF REQUESTED BY PETITIONER

WHEREFORE, GE respectfully requests that the Court enter judgment in GE's favor and:

(a) Reverse the Commissioner's denial of GE's claim for relief;

(b) Grant the relief requested in this petition;

(c) Declare that RSA 77-A:4, IV unlawfully discriminates against foreign commerce in violation of the

Foreign Commerce Clause of the United States Constitution;

(d) Declare that RSA 77-A:4, IV results in grossly distorted and unfair taxation in violation of the Due Process and Commerce Clauses of the United States Constitution;

(e) Order the Department to pay the required and stipulated refund of taxes attributable to the unlawful taxation of dividends paid by the GE Foreign Subsidiaries; and

(f) Grant GE such other and further relief as may be appropriate.

Respectfully submitted,

GENERAL ELECTRIC COMPANY, INC.

By Their Attorneys,

RATH, YOUNG AND PIGNATELLI,
Profession. Association

Dated: July 23, 2002

By:_____

William F. Ardinger
Andrew W. Serrell
Christopher J. Sullivan
One Capital Plaza
P.O. Box 1500
Concord, NH 03302-1500
(603) 226-2600

[Exhibits omitted.]

APPENDIX E

THE STATE OF NEW HAMPSHIRE
STAFFORD, SS. SUPERIOR COURT

Docket No. 02-E-141

GENERAL ELECTRIC COMPANY, INC.

V.

STANLEY R. ARNOLD, COMMISSIONER OF NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION AND NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

ANSWER

NOW COMES the State of New Hampshire, on behalf of the New Hampshire Department of Revenue Administration, and the Commissioner of the New Hampshire Department of Revenue Administration (collectively referred to as "the Department"), through counsel, the Office of the Attorney General, and submits this answer:

1. Admitted.

2. Admitted to the extent that the paragraph describes the responsibilities of the Department. By way of further clarification, the Respondent states that Barbara T. Reid is currently the Acting Commissioner of the Department.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7 Admitted.

8. Admitted.

9. Admitted insofar as the paragraph characterizes the case as involving the issue of the constitutionality of the dividends received deduction allowed under RSA 77-A:4, IV. Paragraph 9 is denied to the extent that it contains legal conclusions.

10. Paragraph 10 contains legal conclusions that require no response and is therefore denied. By way of further answer, the Respondent states that the deduction is not based on the amount of business conducted in the state; it is based on the amount of the dividends paid by the subsidiary that have already been subject to business profits tax. RSA 77-A:4, IV; *First Fin. Group of New Hampshire, Inc. v. State*, 121 N.H. 381, 384-85 (1981).

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. The Department lacks sufficient information to form a belief as to the truth of the allegations of paragraph 17, therefore, they are denied.

18. Paragraph 18 contains legal conclusions that require no response and is therefore denied.

19. Admitted.

20. Paragraph 20 is denied to the extent that it contains legal conclusions suggesting that absence of activity sufficient to carry on business in the State is the only reason a subsidiary would not be required to file business profits tax returns in New Hampshire.

21. Admitted to the extent that GE foreign subsidiaries paid dividends to members of GE's water's edge combined group; denied as to the characterization or relevance of "substantial."

22. Admitted.

23. Paragraph 23 requires no response.

24. Paragraph 24 contains legal argument and conclusions that require no response and is therefore denied.

25. Paragraph 25 contains legal argument and conclusions that requite no response and is therefore denied.

26. Paragraph 26 contains legal argument and conclusions that require no response and is therefore denied.

27. Paragraph 27 contains legal argument and conclusions that require no response and is therefore denied.

28. Paragraph 28 contains legal argument and conclusions and requires no response and is therefore denied.

29. Paragraph 29 contains legal argument and conclusions that require no response and is therefore denied.

30. Paragraph 30 contains legal argument and conclusions that require no response and is therefore denied.

31. Paragraph 31 contains legal argument and conclusions that require no response and is therefore denied.

32. Paragraph 32 contains a prayer for relief that requires no response.

33. Paragraph 33 requires no response.

34. Paragraph 34 is denied. By way of further answer, the Respondent states that it has no knowledge of facts, which would make the dividends received deduction, as applied to GE, unconstitutional, in violation of the Foreign Commerce Clause of the United States Constitution.

35. Paragraph 35 contains a prayer for relief that requires no response.

36. Paragraph 36 requires no response.

37. The Department lacks sufficient information to form a belief as to the truth of the allegations of paragraph 37, therefore, they are denied.

38. Paragraph 38 contains legal argument and conclusions that require no response and is therefore denied.

39. Paragraph 39 contains a prayer for relief that requires no response.

40. Except as expressly admitted above, the Department denies each and every allegation in the Petition.

AND IN FURTHER ANSWER and by way of affirmative defenses, the Department says as follows:

FIRST DEFENSE

The Petition fails to state facts upon which relief could be granted.

SECOND DEFENSE

The Department reserves the right to amend this Answer and statement of Affirmative Defenses.

WHEREFORE, the Department respectfully requests that this honorable Court:

A. Enter an Order affirming the determination of the Commissioner; and

B. Grant such further relief as may be just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE DEPT. OF REVENUE ADMINISTRATION

By Their Attorneys,

PHILIP T. McLAUGHLIN
ATTORNEY GENERAL

KAREN A. SCHLITZER
Attorney
Civil Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3650

Certification

I certify that a copy of the foregoing was mailed this day, first class postage prepaid, to Christopher J. Sullivan, Esq., Rath, Young and Pignatelli, One Capital Plaza, Post Office Box 1500, Concord, NH 03302-1500.

October 30, 2002 ---

KAREN A. SCHLITZER

APPENDIX F

Statutory Provisions*

N.H. R.S.A 77-A:1 Definitions. When appearing in this chapter:

I. "Business organization" means any enterprise, whether corporation, partnership, limited liability company, proprietorship, association, business trust, real estate trust or other form of organization; organized for gain or profit, carrying on any business activity within the state, except such enterprises as are expressly made exempt from income taxation under the United States Internal Revenue Code as defined in RSA 77-A: 1, XX. Each enterprise under this definition shall be subject to taxation under RSA 77-A:2 as a separate entity, unless specifically authorized by this chapter to be treated otherwise, such as, but not limited to, combined reporting. Trusts treated as grantor trusts under section 671 of the United States Internal Revenue Code shall be included in the return of their owners, and such owners shall be subject to the tax thereon to the extent such owners would be considered a business organization hereunder notwithstanding the existence of the trust. The use of consolidated returns as defined in the United States Internal Revenue Code as defined in RSA 77-A:1, XX is not permitted. Notwithstanding any other provision of this paragraph, an enterprise shall not be characterized as business organization and shall be excluded from taxation at the entity level if it elects to be treated as a qualified investment company as defined in RSA 77-A:1, XXI. A partnership, limited liability company, estate, trust except grantor trusts pursuant to section 671 of the United States Internal Revenue Code, "S" corporation, real estate

---

* The statutes as reproduced below reflect New Hampshire's current law. These statutory provisions do not differ in any material respect from the statutory provisions that were in force during the tax years at issue (1990-99). However, the statutes have been amended from time to time over the past sixteen years.

investment trust, or any other such entity, other than an organization electing to be treated as a qualified investment company as defined in RSA 77-A:1, XXI whose net income is reportable by the true owners either directly or indirectly shall be subject to tax at the entity level, and no part of such earnings or loss shall be included in the calculation of the gross business profits of the owners of such entity.

* * * *

XIV. "Unitary business" means one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions.

XV. "Water's edge combined group" means a group of business organizations as defined in RSA 77-A:1, I operating a unitary business, except for overseas business organizations, as defined in paragraph XIX; provided, however, overseas business organizations shall only be excluded from the definition of "water's edge combined group" if the following criteria are met:

(a) The taxpayer certifies that transactions conducted between such business organizations and other members of the group are on a comparable basis to transactions between other business organizations owned or controlled by the taxpayer and any members of the water's edge combined group; and

(b) The taxpayer agrees to report to the commissioner any adjustments as finally determined by the United States Internal Revenue Service with respect to such transactions between any related business organizations as may have a bearing on the comparability of transactions referred to in subparagraph (a). These adjustments shall be made to the 80/20 business organizations so that a comparable basis shall be maintained for New Hamp-

shire tax purposes. Such report shall be made in the manner and within the time limits as provided in RSA 77-A:10. Nothing in this paragraph shall exclude from taxation any business organization carrying on business activity within the state.

XVI. "Water's edge method" means the determination of taxable business profits for a group of business organizations conducting a unitary business by adding their combined net income, the additions and deductions provided in RSA 77-A:4 for members of the group, and apportioning the result as provided in RSA 77-A:3.

* * * *

XIX. "Overseas business organizations" means business organizations with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia.

* * * *

N.H. R.S.A 77-A:2 Imposition of Tax. A tax is imposed at the rate of 8.5 percent upon the taxable business profits of every business organization.

N.H. R.S.A. 77-A:3 Apportionment.

I. A business organization which derives gross business profits from business activity both within and without this state, and which is subject to a net income tax, a franchise tax measured by net income, or a capital stock tax in another state or is subject to the jurisdiction of another state to impose a net income tax or capital stock tax upon it, whether or not such tax is actually imposed, shall apportion its gross business profits so as to allocate to this state a fair and equitable proportion of such business profits. Except as provided in this section, such apportionment shall be made on the basis of the following 3 factors:

(a) The percentage of value of the total real and tangible personal property owned, rented and employed by

the business organization everywhere as is owned, rented and employed by it in the operation of its business in this state. Property owned by the business organization shall be valued at its original cost. Property rented by the business organization shall be valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the business organization less any annual rental rate received by the business organization from subrentals.

(b) The percentage of total compensation paid by the business organization to employees everywhere as is paid by the business organization to employees for services rendered within this state. Such compensation is deemed to be disbursed for services in this state if the service is performed entirely within this state, or if the service is performed both within and without this state and the service performed without this state is incidental to the service within this state, or some of the service is performed in this state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual performing such service resides within this state.

(c) The percentage of the total sales, including charges for services, made by the business organization everywhere as is made by it within this state. Sales of tangible personal property are made in this state if the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of f.o.b. point or other conditions of sale, or the property is shipped from an office, store, warehouse, factory or other place of storage in this state and (1) the purchaser is the United States government, or (2) the business organiza-

tion is not taxable in the state of the purchaser. Sales other than sales of tangible personal property are in this state if the income-producing activity is performed in this state, or the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

II. (a) A fraction, the numerator of which shall be the property factor in subparagraph I(a) plus the compensation factor in subparagraph I(b) plus 2 multiplied by the sales factor in subparagraph I(c) and the denominator of which is 4, shall be applied to the total gross business profits (less foreign dividends) of the business organization to ascertain its gross business profits in this state. If this method of apportionment does not fairly represent the business organization's business activity in this state, the business organization may petition for, or the commissioner may require, in respect to all or any part of the business organization's business activity, if reasonable:

(1) The exclusion of any one or more of the apportionment factors;

(2) The inclusion of one or more additional apportionment factors which will fairly represent the business organization's business activity in the state; or

(3) The employment of any other method to effect an equitable apportionment of the business organization's gross business profits.

(b) For foreign dividends from unitary sources, the following formula shall be used to modify factors relating to included dividends:

(1) Determine a percentage for each dividend payor consisting of dividends paid divided by taxable income which has been computed using United States standards.

(2) Apply this percentage to the dividend payor's foreign property, payroll, and sales.

(3) Sum the results in subparagraph (2) for all dividend payors.

(4) Add the result in subparagraph (3) to the denominators of the combined water's edge group. The numerator will remain the New Hampshire numerator.

(5) Apply the resulting percentage to the foreign dividends.

(6) Add this amount to the amount of New Hampshire taxable business profits computed pursuant to RSA 77-A:3, I and II(a).

III. When 2 or more related business organizations are engaged in a unitary business, as defined in RSA 77-A:1, XIV, a part of which is conducted in this state by one or more members of the group, the income attributable to this state shall be determined by means of the combined apportionment factors of the unitary business group in accordance with paragraphs I and II.

IV. The business organization is entitled to a hearing by the commissioner on request in connection with any change in its apportionment procedure and has the right of appeal from the commissioner's determination as provided in RSA 21-J:28-b.

N.H. R.S.A. 77-A:4 Additions and Deductions. The following adjustments shall be made to gross business profits in determining taxable business profits:

* * * *

IV. In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business

profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

* * * *

N.H. R.S.A 77-A:6 Returns, Declarations, and Combined Reporting.

I. Every business organization having gross business income in excess of $50,000 as defined by RSA 77-A:1, VI, during the taxable period, shall on or before the fifteenth day of the third month in the case of organizations required to file a United States corporation tax return, and the fifteenth day of the fourth month in the case of all other business organizations, following expiration of its taxable period, make a return to the commissioner. The commissioner of revenue administration shall adopt rules, pursuant to RSA 541-A, relative to the form of such return and the data which it must contain for the correct computation of taxable business profits and gross business income attributable to this state and the tax assessed on it. All returns shall be signed by the taxpayer or by its authorized representative, subject to the pains and penalties of perjury.

* * * *

IV. A business organization which is part of a water's edge combined group and required to report under this chapter shall file a return containing the combined net income of the water's edge combined group and such other informational returns as the commissioner shall require by rules adopted under RSA 541-A. The commissioner is authorized to impose the tax as though the entire combined net income of the water's edge combined group was that of one business or-

ganization or the commissioner may adjust the tax or income in such other manner as the commissioner shall determine to be equitable if the commissioner determines it to be necessary in order to clearly reflect the net income earned by such organization from business done in this state. This provision shall not authorize the application of worldwide combined reporting except as provided in RSA 77-A:2-b, II.

No. 06-1210

Supreme Court, U.S.
FILED
APR 20 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Hampshire

RESPONDENT'S BRIEF IN OPPOSITION

KELLY A. AYOTTE
Attorney General

ANN M. RICE*
Associate Attorney General
KAREN A. SCHLITZER
Assistant Attorney General
N.H. DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-1264

JOHN F. HAYES
Revenue Counsel
KATHLEEN J. SHER, ESQ.
N.H. DEPARTMENT OF REVENUE ADMINISTRATION
45 Chenell Drive
Concord, NH 03301
(603) 271-2191

Counsel for Respondent
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether N.H. Rev. Stat. Ann. § 77-A:4, IV facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire.

PARTIES TO THE PROCEEDING

The parties to the proceeding are only those stated in the caption.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for a Writ of *Certiorari* (the "Petition") seeking review of the decision of the New Hampshire Supreme Court in this case. While there is not yet an official reported version of the decision below, it is reported as *General Electric Co. v. Commissioner, New Hampshire Department of Revenue Administration*, at 914 A.2d 246 (2006).[1] ("*General Electric* (NH)").

SUMMARY OF REASONS TO DENY THE PETITION

This Court should deny the Petition because the lower court decision does not warrant review by this Court for several reasons. First, Petitioner failed to establish that the New Hampshire Business Profits Tax discriminates against foreign commerce in violation of the Foreign Commerce Clause. Second, the lower court correctly applied the Commerce Clause standards as set forth in the decisions of this Court. Third, the lower court's decision that the New Hampshire taxing regime does not favor in-state activity over foreign commerce is consistent with other state court decisions. Finally, this case should not be reviewed because the Petitioner's claims are purely hypothetical, and it has not been harmed.

[1] Petitioner has included a copy of the New Hampshire Supreme Court's decision in its Appendix beginning at 1a. In this Brief, Respondent will cite to items included in Petitioner's Appendix by referring to "Petitioner's App." and then the page number.

STATEMENT OF THE CASE

Respondent, the New Hampshire Department of Revenue Administration (the "Department"), submits the following additional information to supplement and correct Petitioner's statements of fact, descriptions of New Hampshire's business tax system, and the proceedings below.

A. Petitioner's Statement Of The "Question Presented" Is Not The Question That Was Presented To The Lower Court.

The Question Presented by Petitioner is incorrect in two respects. First, the Question Presented by Petitioner is not the issue as it was presented to the lower court. Second, Petitioner's allegation that the New Hampshire statute at issue grants a dividends received deduction "only to the extent the underlying corporation engages in in-state business activity[ ]" is incorrect. Petition at 2.

With regard to the first point, the lower court noted that "the issue on appeal, which is consistent with [Petitioner's] argument below, focuses specifically upon whether [N.H. Rev. Stat. Ann. §] 77-A:4, IV facially discriminates against parents of dividend-paying foreign subsidiaries which do not conduct business in the state." *General Electric* (NH), Petitioner's App. at 9a-10a. As identified by the lower court, the "central issue" in the case was "[w]hether [N.H. Rev. Stat. Ann. §] 77-A:4, IV facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire. *General Electric* (NH), Petitioner's App. at 12a.

Second, Petitioner's claim that "the tax regime at issue here grants a dividends received deduction to corporate shareholders of foreign corporations *only to the extent the underlying corporation engages in in-state business* activity[]" (Petition at 2 (emphasis added)) is inaccurate. N.H. Rev. Stat. Ann. § 77-A:4, IV allows a parent corporation to take a deduction for dividends received from its corporate subsidiaries when the gross business profits of the subsidiaries have already been subject to tax in New Hampshire. *General Electric* (NH), Petitioner's App. at 5a. A corporation can have significant activity in a state but may not have income from its operations due to operating losses. Therefore, New Hampshire's dividends received deduction is not based on the extent of a subsidiary's in-state activity; rather, it is based on the income that has previously been subject to tax.

B. The New Hampshire Business Profits Tax Statute.

New Hampshire taxes the income of a unitary business by apportioning the income of the unitary business to New Hampshire using the combined reporting method. *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XIII, XV, XVI (2003)). A "unitary business" is "one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or are interdependent in their functions." *General Electric* (NH), Petitioner's App. at 3a; N.H. Rev. Stat. Ann. § 77-A:1, XIV.

1. New Hampshire Uses The Water's Edge Method Of Apportionment.

New Hampshire uses the water's edge method of apportionment, which limits the State's taxing authority to the United States borders for apportioning business activity to New Hampshire. N.H. Rev. Stat. Ann. § 77-A:1, XV. The domestic members (i.e., within the United States) of the unitary business comprise what is known as the "water's edge combined group." *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XV). The income of all the domestic members of the water's edge combined group is aggregated in the combined report. *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XVI).

2. Because Foreign Members Of The Unitary Business Are Excluded From The Water's Edge System, Their Income Is Excluded From The Combined Report And Not Subject To Tax.

General Electric Company ("GE" or "Petitioner") has unitary foreign subsidiaries which satisfy the definition of "overseas business organization[s]"[2] (hereinafter referred to as "foreign subsidiaries" or "foreign members") *General Electric* (NH), Petitioner's App. at 4a. Those foreign subsidiaries paid dividends to members of the water's edge

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[2] "Overseas business organizations" are business organizations "with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia." *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XIX (2003)).

group, and those are the foreign dividends at issue in this case. *General Electric* (NH), Petitioner's App. at 4a.

Although foreign subsidiaries are not considered part of the water's edge combined group,[3] they may still qualify as a unitary member. *Id.* at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XIV, XV). In the water's edge system, the income of those foreign members of the unitary business is excluded from the combined report. *General Electric* (NH), Petitioner's App. at 3a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, XV); N.H. Rev. Stat. Ann. § 77-A:1, XIX.

3. Calculating Taxable Business Profits Of A Unitary Business.

Once the net income from all members of the water's edge group is combined, any domestic "inter-group activity," such as a payment of dividends, is excluded in determining the "gross business profits" of the group. *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Code of Admin. Rules, Rev. 302.10(b) *and* N.H. Rev. Stat. Ann. § 77-A:3, I (2003)). The "gross business profits" are then apportioned to the State using three factors: property, payroll, and sales. *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:3, I). The resulting amount constitutes the "New Hampshire water's edge taxable business profits" of the group. *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, IV, XV, XVI *and* N.H. Code of Admin. Rules, Rev. 301.02).

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[3] A "water's edge combined group" is "a group of business organizations . . . operating a unitary business, except for overseas business organizations." N.H. Rev. Stat. Ann. § 77-A:1, XV.

In this calculation, the dividends paid by a foreign subsidiary to a member of the water's edge combined group are initially excluded from the group's gross business profits and are apportioned separately to determine the "New Hampshire foreign dividends taxable business profits." *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:3, II(b) (2003) *and* N.H. Admin. Code of Rules, Rev. 311.24(a), (f)). The "New Hampshire foreign dividends taxable business profits" are then added to the "New Hampshire water's edge taxable business profits" to produce "New Hampshire taxable business profits." *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:3, II(b)(6)). The applicable tax rate is then applied, resulting in the tax due. *General Electric* (NH), Petitioner's App. at 4a (*citing* N.H. Rev. Stat. Ann. § 77-A:2 (2003)). In this manner, dividends paid by a foreign member of the unitary group to the domestic members are apportioned to New Hampshire and taxed. *General Electric* (NH), Petitioner's App. at 4a.

C. Specific Facts Pertaining To GE.

The lower court recognized that Petitioner posed "a hypothetical situation[]" to the court for adjudication.[4] *General Electric* (NH), Petitioner's App. at 10a. The court noted that it was, therefore, uncertain how the state

[4] The Respondent objects to Petitioner's statement that the settlement agreements preserved any specific constitutional issue for appeal. *See* Petition at 7. The Respondent's position throughout this litigation has been that pursuant to the settlement agreements, what was termed "the foreign dividend issue" in the settlement agreements could be *litigated* by the parties because the parties could not reach agreement on that issue.

taxing regime, including N.H. Rev. Stat. Ann. § 77-A:4, IV "would operate if it did[,]" but the court nevertheless accepted Petitioner's hypothetical[5] and reached the merits of the issue posed, reasoning that a facial attack on N.H. Rev. Stat. Ann. § 77-A:4, IV raised broad constitutional concerns and that the issue was likely to come before the court again. *General Electric* (NH), Petitioner's App. at 10a.

The income of GE's foreign subsidiaries was excluded from the calculation of GE's tax liability for the tax years because each was an overseas business organization within the meaning of N.H. Rev. Stat. Ann. § 77-A:1, XIX. *Id.* at 4a. None of GE's foreign affiliates was domiciled in or transacted business in New Hampshire during the tax years at issue (1990-1999). *Id.* at 2a. Accordingly, none of GE's foreign subsidiaries were subject to taxation in New

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[5] It should be noted that Petitioner's hypothetical claim of discrimination was found to have been based on its incorrect interpretation of N.H. Rev. Stat. Ann. § 77-A:4, IV. Under Petitioner's interpretation of the statute, N.H. Rev. Stat. Ann. § 77-A:4, IV allowed a full deduction of all foreign dividends paid to the member of the water's edge group, even if they had not already been subject to tax. *General Electric* (NH), Petitioner's App. at 11a. The lower court rejected this interpretation of the statute, finding that "the statutory construction urged by GE ... would allow a 'hyper-deduction' regardless of the amount of the tax paid in New Hampshire" and that such an interpretation yields an "absurd result." *Id.* The lower court opined that if the statute operated as Petitioner suggested, it would possibly "run afoul of the Commerce Clause[.]" *Id.* The lower court agreed with the Respondent, however, and found that the deduction allowed under N.H. Rev. Stat. Ann. § 77-A:4, IV, by its terms, is only up to the amount of gross business profits already taxed, and that the purpose of the deduction is "to prevent double taxation on the *identical* gross business profits" of a subsidiary and its parent. *Id.* (emphasis and quotation in opinion).

Hampshire. *Id.* at 2a.[6] The dividends paid to GE by its foreign subsidiaries, however, remain subject to an apportioned tax because they constitute income to the water's edge combined group. N.H. Rev. Stat. Ann. § 77-A:3, II(b).

D. N.H. Rev. Stat. Ann. § 77-A:4, IV Allows A Deduction For Business Profits Which Have Already Been Subject To Tax.

Petitioner sought to avoid taxation of the foreign dividends, claiming a right to a deduction pursuant to N.H. Rev. Stat. Ann. § 77-A:4, IV, but the Respondent denied the request because the foreign subsidiaries did not transact business in the State, and therefore, their gross business profits were not subject to tax in New Hampshire. *General Electric* (NH), Petitioner's App. at 2a.

Dividends received from foreign subsidiaries which do not conduct business in the State and, accordingly, pay no business profits tax, do not qualify for the deduction of N.H. Rev. Stat. Ann. § 77-A:4, IV. *Id.* at 5a. N.H. Rev. Stat. Ann. § 77-A:4, IV permits a parent corporation to take a deduction for dividends received from its corporate subsidiaries when the gross business profits of the subsidiaries have already been subject to tax in New Hampshire. *Id.* at 2a.

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[6] Petitioner's suggestion, therefore, that its foreign subsidiaries "were each treated on a separate company basis, both with respect to their own [business profits tax] obligations and with respect to transactions with members of GE's domestic combined group" (Petition at 7) is misleading to the extent that it implies that these foreign subsidiaries were subject to separate entity taxation, or any taxation at all. None of GE's foreign subsidiaries did any business within New Hampshire, and they therefore did not even file tax returns in New Hampshire. *General Electric* (NH), Petitioner's App. at 8a; Petition at 7.

N.H. Rev. Stat. Ann. § 77-A:4, IV has been used by corporations with subsidiaries that file separately, and not under the combined reporting method. *Id.* at 5a. The statute allows a deduction for dividends paid to a taxable parent by subsidiaries that conducted business in the State and were therefore subject to a separate business profits tax.[7] *Id.* at 5a. The dividends received from foreign subsidiaries that do not conduct business in the State, and accordingly pay no business profits tax, do not qualify for the deduction, *id.* at 250 – where no tax is imposed, there is no deduction allowed, N.H. Rev. Stat. Ann. § 77-A:4, IV.

ARGUMENT

I. Petitioner Failed To Establish That The New Hampshire Business Profits Tax Facially Discriminates Against Foreign Commerce In Violation Of The Foreign Commerce Clause.

Petitioner alleges that the dividends received deduction of the business profits tax facially discriminates against foreign commerce. Its claim rests entirely upon the non-discrimination component of Foreign Commerce Clause jurisprudence. Petitioner, however, does not apply the standards established by this Court for determining whether a tax discriminates against foreign commerce.

[7] Petitioner's assertion that New Hampshire's taxing regime imposes tax liability on domestic combined groups and foreign corporations as separate entities is misleading, *see* Petition at 18, because it implies that foreign corporations are the only entities that must file separate returns. In fact many domestic entities, including entities that are related to but not unitary with members of combined groups, file as separate entities.

The court below applied the proper standards and correctly determined that Petitioner did not show that discrimination exists.

A. The Established Standards.

The non-discrimination component of Foreign Commerce Clause jurisprudence has been considered and applied in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 310-311 (1994) (*citing Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977)). The non-discrimination component prohibits "taxes that pass an unfair share of the tax burden onto interstate [foreign] commerce," *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992), or taxes that "systematically 'overtax[]' foreign corporation." *Barclays*, 512 U.S. at 314. A law is discriminatory if it taxes interstate commerce more heavily than domestic commerce. *See Kraft General Foods, Inc. v. Iowa Department of Revenue*, 505 U.S. 71, 79-80 (1992).

In determining whether foreign commerce is more heavily taxed, a court must consider "the operation of other provisions of the . . . statute" under review. *Kraft*, 505 U.S. at 80-81 (quoting amicus brief of the United States with approval); *see also Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (a tax must be evaluated in light of other provisions of the tax scheme). Further, this Court has specifically stated that the correct comparison to be made in cases like this one is between taxpayers who are the "most similarly situated." *See Kraft*, 505 U.S. at 80 n.23. Finally, the burden of showing that foreign commerce is more heavily taxed is on the party claiming discrimination. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). This Court's standards are well-established and have been

recently considered and applied by this Court. *See South-Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999). There is no need to revisit them.

B. The New Hampshire Supreme Court Applied The Standards Established By This Court And Correctly Held That Petitioner Did Not Show That Facial Discrimination Exists.

The New Hampshire Supreme Court correctly determined that Petitioner did not show that discrimination exists. Following the decisions of this Court, the New Hampshire Supreme Court properly recognized that this Court requires an analysis of the aggregate tax burden when reviewing a claim of an allegedly discriminatory tax which violates the Commerce Clause. *General Electric* (NH), Petitioner's App. at 17a (*citing Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963) (stating that "a proper analysis must take the whole scheme of taxation into account.")). The lower court, therefore, assessed the State's taxing scheme as a whole and evaluated the "aggregate tax imposed upon a unitary business[.]". *General Electric* (NH), Petitioner's App. at 17a.

When all of the provisions of the business profits tax statute are taken into account, Petitioner cannot show facial discrimination. While a combined group with a foreign subsidiary with operations in New Hampshire may be entitled to a limited dividends received deduction, the unitary foreign subsidiary will be subject to an apportioned tax on its entire net income. When both the apportioned tax of the foreign subsidiary's net income and the limited dividend received deduction are considered, it is not possible to establish that the business profits tax will

be systematically higher for the combined group and its foreign subsidiary without operations in New Hampshire than for a combined group and its foreign subsidiary with operations in New Hampshire.

1. The Statute Does Not Discriminate And Provides the Same "Taxing Symmetry" and Parity Upheld in Other State Court Decisions which Rely on *Kraft*.

The lower court properly found that New Hampshire's business profits tax statute does not discriminate. *General Electric* (NH), Petitioner's App. at 17a. A foreign subsidiary, whether unitary or not, conducting business in New Hampshire is subject to the business profits tax and would be required to pay an apportioned tax upon its profits attributable to the State. *General Electric* (NH), Petitioner's App. at 18a; N.H. Rev. Stat. Ann. § 77-A:1, VI; N.H. Rev. Stat. Ann. § 77-A:3, I. It would do so through filing a separate return. Any dividends paid to a unitary parent corporation doing business within the state, which normally would be apportioned and included in the parent corporation's taxable business profits, may be deducted pursuant to N.H. Rev. Stat. Ann. § 77-A:4, IV up to the amount of business profits already taxed. *General Electric* (NH), Petitioner's App. at 18a (*citing* N.H. Rev. Stat. Ann. § 77-A:4, IV; *First Financial Gr. of N.H. v. State*, 121 N.H. 381, 385 (1981). Such ensures that the income of the business entity is taxed only once. *Id.*

On the other hand, the income of a unitary foreign subsidiary that does not conduct business in New Hampshire is not included in the tax base of the combined group and does not file a separate return, so its income is not

taxed. *General Electric* (NH), Petitioner's App. at 18a (*citing* N.H. Rev. Stat. Ann. § 77-A:1, I). Any dividends paid to a unitary combined group with operations in New Hampshire, however, constitute income to the combined group (N.H. Rev. Stat. Ann. § 77-A:3, II(b)), and they are accordingly subject to an apportioned tax. *General Electric* (NH), Petitioner's App. at 18a. Because that dividend income has only been taxed once, it cannot be deducted under N.H. Rev. Stat. Ann. § 77-A:4, IV. *Id.*; N.H. Rev. Stat. Ann. § 77-A:4, IV (providing for a deduction "to prevent double taxation . . . "). Consequently, the lower court found that New Hampshire's statute provides the "taxing symmetry" found in *E.I. Du Pont de Nemours v. State Tax Assessor*, 675 A.2d 82 (Me. 1996), and the "balancing the burdens" formula affirmed in *Appeal of Morton Thiokol*, 254 Kan. 23 (1993). *General Electric* (NH), Petitioner's App. at 18a.

Similarly, the Kansas Supreme Court upheld its state's combined reporting tax formula which allowed in-state corporations to deduct dividends received from domestic subsidiaries, but included dividends received from foreign subsidiaries in the calculation of taxable income. *Appeal of Morton Thiokol, Inc.*, 254 Kan. at 36-37. The court held that the formula effectively "balanc[ed] the [tax] burdens" of each entity and that "the aggregate tax imposed by [the state] on a unitary business with a domestic subsidiary would not be less burdensome than that imposed by [the state] on a unitary business with a foreign subsidiary" because the state would tax the income of the domestic subsidiary, but would only tax the dividend of the foreign subsidiary. *Id.* at 38.

2. The New Hampshire Supreme Court Correctly Applied The Holdings Of The *Kraft* Decision In This Case.

Petitioner asserts that the lower court analyzed New Hampshire's taxing regime as a whole and looked at the aggregate tax imposed upon a unitary business. Petition at 10. Petitioner argues that the lower court should have ignored any additional tax that would be paid by a foreign subsidiary as a result of its operations in New Hampshire and instead focused solely on the difference in the tax on foreign dividends between a combined group with a foreign subsidiary with operations in New Hampshire and a combined group with a foreign subsidiary without operations in New Hampshire. Petitioner's arguments are not grounded in this Court's decision in *Kraft* or the decisions of State courts that have followed it. *See Morton Thiokol*, 254 Kan. 23 (1993). In fact, Petitioner's arguments on this issue are predicated upon taking the ubiquitous footnote 23 of the *Kraft* decision completely out of context.

Reading the entire *Kraft* decision leads to the conclusion that the determination of the most similarly situated taxpayers and the appropriate comparison depends upon the type of discrimination being alleged. In *Kraft*, the taxpayer claimed that Iowa's single-entity reporting system, which allowed a deduction for dividends received from a domestic subsidiary but did not allow for a deduction for dividends received from a foreign subsidiary, favored domestic commerce over foreign commerce. *See Kraft*, 505 U.S. at 74, n.10. Iowa countered that any claimed discrimination did not benefit Iowa business. Additionally, the United States, as amicus, advanced several arguments that Iowa's different treatment of dividends from foreign and domestic subsidiaries did not

amount to prohibited discrimination against foreign commerce, including the argument that there is no discrimination because if the aggregate of the federal tax and the tax imposed by other states is taken into consideration, Iowa's scheme does not favor business in the United States. *Id.* at 79-80.

The *Kraft* Court rejected the arguments of both Iowa and the amicus United States, and found that the appropriate comparison is between a corporation with a domestic subsidiary that did no business in Iowa and a domestic corporation with a foreign subsidiary. *Id.* at 80. In *Kraft*, the claimed discrimination was between domestic commerce and foreign commerce, even though there was no direct benefit to Iowa business. This Court held that the absence of a local benefit did not exempt such discrimination. *Id.* at 79. Therefore, in that case, it was not appropriate to aggregate the tax paid by a domestic corporation and its domestic subsidiary that did business in Iowa to determine if domestic commerce was being treated more favorably than foreign commerce. This is because domestic commerce on the whole was being favored over foreign commerce even though a domestic corporation with a domestic subsidiary that did business in Iowa was not necessarily being favored over foreign commerce.

Unlike the discrimination in *Kraft*, the discrimination that Petitioner alleges is discrimination between New Hampshire commerce and foreign commerce. It is Petitioner's contention that N.H. Rev. Stat. Ann. § 77-A:4, IV provides an advantage to foreign subsidiaries if they conduct operations in New Hampshire, thus favoring New Hampshire commerce. Therefore, in this case, it is appropriate to compare the aggregate business profits tax of a combined group and its foreign subsidiary with operations

in New Hampshire with the business profits tax of a combined group with a foreign subsidiary with no operations in New Hampshire. As the discrimination that is alleged is based upon a claimed benefit by operating in New Hampshire, the lower court correctly considered the attendant cost to obtain that benefit. When both the cost and the benefit are considered together, it is clear that there is, in fact, no commercial advantage for a foreign subsidiary to have operations in New Hampshire and no discrimination against foreign commerce.

3. The New Hampshire Supreme Court's Decision Does Not Conflict With This Court's Decisions In *Fulton* and *Boston Exchange*.

The purpose of the dormant commerce clause is to "protect markets and participants in markets, not taxpayers as such." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). When deciding challenges based on facial discrimination, the Supreme Court still examines the burdens on interstate commerce rather than simply determining whether intrastate, interstate, and foreign commerce receive identical treatment under a state's tax law. *Caterpillar, Inc. v. Commissioner of Revenue*, 568 N.W.2d 695 (Minn. 1997), *cert. denied*, 118 S.Ct. 1043 (1998). The anti-discrimination component of the *Complete Auto* test is best viewed as promoting equal treatment of domestic and foreign commerce, but not identical treatment of all taxpayers engaged in domestic and foreign commerce. *Id.* (citation omitted).

In *Fulton*, North Carolina assessed an intangible property tax against shareholders of corporate stock. In determining the value of the stock on which the tax was assessed, a deduction was allowed equal to the percentage of the corporation's income subject to taxation in North Carolina. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 328 (1996). This Court found that the unmistakable discrimination in *Fulton* clearly violated the anti-discrimination prong of the *Complete Auto* test. *Id.* at 333. The discrimination affected the ability of corporations to raise capital in the North Carolina market because those corporations that engaged in more activity in North Carolina were given a clear competitive advantage. *Id.*

The lower court correctly found that *Fulton* was not analogous to the present case. The deduction against North Carolina's intangible property tax was available against the stock of all corporations to the extent that their income was taxable in that state. The deduction allowed by N.H. Rev. Stat. Ann. § 77-A:4, IV, however, is not available to all stockholders of corporations, but only to parents of affiliates that own 80% of a subsidiary and only to the extent that the subsidiary has paid business tax on the same income distributed by the dividend. *General Electric* (NH), Petitioner's App. at 6a and 8a. Because the dividend deduction is only available to parents of subsidiaries, the dividend payers are not competing with other corporations for capital in New Hampshire the way that the corporations were competing for capital in North Carolina.

The issue that must be analyzed in the context of the parent and its unitary subsidiary is whether the taxing regime discriminates against parents with unitary subsidiaries with investments in other states or countries as

opposed to parents with unitary subsidiaries with investments in the taxing state. The lower court used the correct analysis by focusing on the aggregate tax paid by a parent and a unitary subsidiary operating in New Hampshire as compared to the aggregate tax paid by a parent and a unitary subsidiary not operating in New Hampshire. *General Electric* (NH), Petitioner's App. at 18a. While the two did not receive identical treatment, the New Hampshire Supreme Court was correct in its determination that there is no differential treatment that benefits the former and burdens the latter, nor is the latter taxed more heavily than the former. *Id.*

The lower court also correctly found that New Hampshire's taxing regime did not discriminate in a way that was analogous to *Boston Exchange*. *General Electric* (NH), Petitioner's App. at 18a. In *Boston Exchange*, this Court found that the New York stock transfer tax, which taxed out of state stock transfers by nonresidents more heavily than transfers that utilized a stock exchange located in New York, provided a direct commercial advantage to stock exchanges located in New York at the expense of non-New York stock exchanges. *Boston Exchange v. State Tax Commission*, 429 U.S. 318, 332 (1977). This Court described how New York used its power to tax to coerce business operations to be performed in the State by "foreclosing tax-neutral decisions." 429 U.S. at 336.

The lower court correctly found that the taxing regime as a whole did not provide a parent with a foreign subsidiary with operations in New Hampshire an advantage over a parent with a foreign subsidiary without operations in New Hampshire. *General Electric* (NH), Petitioner's App. at 18a. While N.H. Rev. Stat. Ann. § 77-A:4, IV may provide a limited deduction for dividends received from a

subsidiary with operations in New Hampshire, the foreign subsidiary's income is also subject to tax, unlike the foreign subsidiary without operations in New Hampshire. Thus, the decision whether to have a foreign subsidiary conduct operations in New Hampshire is a tax-neutral one. Unlike the nonresidents selling stocks in *Boston Exchange*, the corporations considering whether to have their foreign subsidiaries located in New Hampshire will not receive a net tax benefit if the operations are in the taxing state. Nothing in the record shows that foreign commerce is taxed more heavily than intrastate commerce based upon the lower court's interpretation of how N.H. Rev. Stat. Ann. § 77-A:4, IV operates. Consequently, this Court should deny *certiorari*.

II. The New Hampshire Supreme Court's Decision Does Not Conflict With Decisions Of Other State Appellate Courts.

There is no conflict among the lower courts, despite Petitioner's assertions to the contrary. Without exception, the decisions that Petitioner claims to be in conflict with the New Hampshire Supreme Court's decision did not involve deductions for foreign dividends received from unitary subsidiaries in the context of water's edge combined reporting tax regimes. In fact, those state appellate courts which have examined dividend received deductions in the context of a water's edge combined reporting statutory framework, have found statutes very similar to New Hampshire's to be constitutionally sound. *See, e.g., Morton Thiokol*, 254 Kan. 23 (1993) (dividend received deduction allowed for domestic subsidiaries but denied to foreign subsidiaries permissibly avoids double taxation of domestic subsidiary where its income is also included and taxed

in the unitary combined income) *and E.I. Du Pont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82, 87-88 (Me. 1996) (deduction of domestic subsidiary dividends but not foreign subsidiary dividends from parent's income does not violate Foreign Commerce Clause because deduction provides "taxing symmetry" where domestic subsidiary's income is included in unitary combined income while income of foreign subsidiary is not).

Petitioner argues that the New Hampshire Supreme Court's decision conflicts with a series of decisions by the California Court of Appeals in *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 3d 41 (Cal. App. 2000); and *General Motors v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006). Petition at 12. The California Court of Appeals, however, *citing Du Pont*, recently upheld a limited deduction for dividends received from foreign corporations while allowing a full deduction for dividends received from domestic corporations in the context of a water's edge combined report. *Fujitsu IT Holdings, Inc. v. Franchise Tax Bd.*, 15 Cal. Rptr. 3d 473 (Cal. App. 2004). The California Appellate Court held that California's water's edge method of apportionment of income did not facially discriminate against foreign commerce because it had the same kind of "taxing symmetry" present in *Du Pont*. *Fujitsu*, 15 Cal. Rptr. 3d at 489. Other courts have also relied on the reasoning of *Morton Thiokol* and *Du Pont* in finding that the taxation of foreign-source income is not invalid under *Kraft* where the consolidated or combined reporting method is used, although some have invalidated taxing regimes as discriminatory for other

reasons not applicable here. *See Hutchinson Technology v. Com'r of Revenue*, 698 N.W.2d 1, 17 (Minn.2005) ("But in contrast to the circumstances in *Morton Thiokol* and *Du Pont*, which involved taxes imposed by the same state for which the dividend-received deduction was intended to compensate, the additional tax liability for which the dividend-received deduction would compensate here is *federal* tax liability"); *Emerson Elec. Co. v. Tracy*, 90 Ohio St.3d 157, 735 N.E.2d 445, 448-49 (2000) (recognizing the validity of the "taxing symmetry" principle where domestic and foreign subsidiaries are both taxed once); *Conoco, Inc. v. Taxation & Revenue Dept.*, 122 N.M. 736, 931 P.2d 730, 735 (1996) (same), *cert. denied*, 521 U.S. 1112 (1997); *Bernard Egan & Co. v. State, Dept. of Rev.*, 769 So.2d 1060, 1061 (Fla. Dist. Ct. App. 2000) (upholding similar taxing regime as constitutional because domestic and foreign subsidiary income was equally treated under the consolidated reporting method), *cert. denied*, 534 U.S. 995 (2001); *Caterpillar, Inc. v. Commission of Revenue*, 568 N.W.2d 695, 701 (Minn. 1997) (adopting similar analysis as applied to foreign interest and royalty payments), *cert. denied*, 522 U.S. 1112 (1998).

Petitioner also claims that the North Dakota Supreme Court, in *D.D.I., Inc. v. State ex rel. Clayburgh*, 657 N.W.2d 228 (N.D. 2003), struck down a dividends received deduction that is "identical" to New Hampshire's dividends received deduction finding it discriminatory in violation of the Commerce Clause. Petition at 12. North Dakota's dividends received deduction is not identical to New Hampshire's dividend received deduction. In fact, they bear little resemblance to each other. The New Hampshire dividends received deduction only applies to dividends from subsidiaries to parent corporations that own a minimum of 80% of the subsidiaries' stock.

General Electric (NH), Petitioner's App. at 6a-7a. North Dakota's dividend received deduction applies to any dividend received by a corporation regardless of the percentage of stock ownership. *D.D.I.*, 657 N.W.2d at 230. This distinction is significant because New Hampshire's taxation of foreign dividends is predicated upon the foreign subsidiary being part of the unitary business conducted in New Hampshire. In order for a foreign subsidiary to be unitary with any subsidiary there must be a unity of ownership. N.H. Rev. Stat. Ann. § 77-A:1, XIV. The New Hampshire Supreme Court correctly concluded that *D.D.I.* was inapposite because it did not consider a dividend received deduction in the context of a water's edge combined reporting tax regime.

The lower court was also correct in distinguishing the line of California cases that began with *Ceridian Corp. v. Franchise Tax Bd.*, 85 Cal. App. 4th 875, 883 (2000) on which Petitioner relies. The deduction at issue in *Ceridian* is also distinguishable from N.H. Rev. Stat. Ann. § 77-A:4, IV because unlike the deduction at issue here, which allows a deduction regardless of the source of the income, N.H. Rev. Stat. Ann. § 77-A:4, IV, it allowed dividends to be deducted only if they were paid from "California sources[,]" *Ceridian*, 85 Cal. App. 4th at 883. The *Ceridian* court found the deduction to be like that in *Fulton* because it disallowed a deduction based on the amount of property and employees that the dividend-declaring insurer had in another state. *Ceridian*, 85 Cal. App. 4th at 887. Therefore, it favored domestic competitors over foreign, and tended to discourage domestic corporations from having property or employees in other states. *Ceridian*, 85 Cal. App. 4th at 887. No such favoritism occurs under the dividends received deduction at issue here. The court

below correctly applied this Court's standards for determining discrimination under the Foreign Commerce Clause, and the decisions of other state appellate courts are consistent with it.

Petitioner's reliance on the other California case, *Farmer Bros. Co. v. Franchise Tax Bd.* is also unhelpful to its claim. 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003). The tax statute in that case was like the one struck down in *Fulton*. In *Farmer Bros.*, the State of California allowed a reduced dividend tax "to the extent such dividends are 'paid from income from California sources,'" so to the extent that a dividend-paying corporation had a larger share of its sales, property and/or payroll in California, the taxpayer could deduct a larger percentage of the dividends it received, but no deduction was allowed for dividends generated from business outside of California. *Farmer Bros.*, at 396, 399. Relying on *Fulton* (where North Carolina reduced a tax "in direct proportion to the amount of business the owned corporation did within the state's borders"), the court held that the statute was facially discriminatory because it favored dividend-paying corporations doing business in California and paying California taxes over dividend-paying corporations which did no business in California and paid no taxes in California. *Id.* at 398-99. The deduction was facially discriminatory under the Commerce Clause because it discriminated between transactions on the basis of an interstate element. *Id.* In contrast, no such discrimination occurs in the case at bar because the deduction is allowed regardless of the source of income. N.H. Rev. Stat. Ann. § 77-A:4, IV.

General Motors v. Franchise Tax Bd. is also unhelpful to GE's claim because it addresses the same California

statutory scheme in *Farmer Bros.*, and it therefore relies on *Farmer Bros.* in finding that the statute is facially discriminatory. *General Motors v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41, 56 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (noting that the California Supreme Court denied review of the *Farmer Bros.* decision and that *Farmer Bros.* is dispositive). Consequently, the court in *General Motors* agreed with the *Farmer Bros.* court's holding that the statute was facially discriminatory, noting that the Court of Appeal "rejected all of the arguments the FTB presents to us and concluded that the tax, as computed with respect to section 24402, violates the commerce clause." *General Motors*, 16 Cal. Rptr. 3d at 56.

III. Petitioner's Claim Is Purely Hypothetical, And It Has Not Been Harmed.

The Court should not review this case because Petitioner has not been harmed in any way. Its entire case is based on its creation of a hypothetical possibility that a foreign subsidiary could avail itself of a deduction that is afforded to prevent double taxation. The Court has stated that discrimination "is a practical conception" and the Court "must deal in this matter, as in others, with substantial distinctions and real injuries." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932). The power of this Court to invalidate a state law should not be invoked solely on the basis of a hypothetical possibility.

Not only is Petitioner's claim based solely on a hypothetical, but it has distorted Commerce Clause jurisprudence by couching its claim as one of facial discrimination to avoid having to demonstrate any injury. Although this

Court has declared that state laws discriminating on their face are "virtually per se invalid[,]" *Fulton*, 516 U.S. at 331 (citations omitted), it has done so in order to relieve claimants from the difficulty of proving the extent of the effect of a facially discriminatory statute. *See Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 269 (1984). This Court has never ruled that a statute should be invalidated without any demonstrable harm. Petitioner has not demonstrated any harm.

N.H. Rev. Stat. Ann. § 77-A:4, IV is not discriminatory on its face. It treats those engaged in foreign commerce and domestic commerce equally. The New Hampshire Constitution extends the same protection against double taxation to foreign corporations that it provides to New Hampshire businesses. A statute that is discriminatory on its face would grant the deduction for domestic corporations and deny it to foreign corporations. Thus, it is not discrimination that is the source of the Petitioner's complaint, but equal treatment under New Hampshire's tax law. Because Petitioner can conceive of a possibility in which one of its foreign subsidiaries might avail itself of this protection against double taxation by conducting a portion of its business in New Hampshire does not render the statute unconstitutional on its face. As the Kansas Supreme Court ruled in *Morton Thiokol*, a taxing scheme is not unconstitutional if any hypothetical can be devised which results in differential treatment. *Morton Thiokol*, 254 Kan. at 37. This Court has "never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands" and consequently, Petitioner's claims fail. *General Motors Corp. v. Tracy*, 519 U.S. 278, 311 (1997).

If New Hampshire's dividend received deduction speaks to foreign commerce at all, it sends the message that if foreign corporations choose to do business in New Hampshire, they will not be subject to double-taxation. It does not impose a greater burden on foreign commerce with no operations in New Hampshire. It only protects against unfair taxation. A non-discriminatory state protection against unfair taxation does not violate the United States Constitution.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

KELLY A. AYOTTE
Attorney General

ANN M. RICE*
Associate Attorney General
KAREN A. SCHLITZER
Assistant Attorney General
N.H. DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-1264

JOHN F. HAYES
Revenue Counsel
KATHLEEN J. SHER, ESQ.
N.H. DEPARTMENT OF
REVENUE ADMINISTRATION
45 Chenell Drive
Concord, NH 03301
(603) 271-2191

Counsel for Respondent
**Counsel of Record*

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IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE
DEPARTMENT OF REVENUE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITIONER'S SUPPLEMENTAL BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K STREET, NW
WASHINGTON, DC 20005
(202) 736-8000

WALTER HELLERSTEIN*
JEROME B. LIBIN
MARY E. MONAHAN
SUTHERLAND ASBILL
& BRENNAN LLP
1275 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
(202) 383-0100

BOBBY L. BURGNER
FRANK YANOVER
JOHN AMATO
GENERAL ELECTRIC
COMPANY
3135 EASTON TURNPIKE
FAIRFIELD, CT 06828
(203) 373-2501

WILLIAM F.J. ARDINGER
RATH, YOUNG AND
PIGNATELLI, P.C.
ONE CAPITAL PLAZA
CONCORD, NH 03302
(603) 226-2600

Counsel for Petitioner

October 9, 2007

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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The facial discrimination against foreign commerce in this case is stark: New Hampshire grants a tax deduction for dividends received from foreign subsidiaries *if, and only if,* those foreign subsidiaries conduct income-producing activity in New Hampshire. Consequently, the regime on its face favors the investment in foreign corporations that conduct in-state rather than out-of-state activity, in violation of settled Commerce Clause principles.

The United States is unperturbed by this discrimination because it purportedly "focuses on only half of the relevant question." U.S. Br. 8. According to the United States, there is no discrimination when one looks at "New Hampshire's taxing regime as a whole and ... the aggregate tax imposed upon a unitary business." *Id.* (quoting Pet. App. 17a). In other words, if one looks at the tax imposed on the foreign subsidiary *as well as* the tax imposed on the recipient of the foreign subsidiary's dividend, one cannot demonstrate discrimination because the "discriminatory tax benefit" (*id.*) conferred on the dividend recipient (the dividends received deduction) is "fully matched by a corresponding burden" (*id.*) on the foreign subsidiary (the tax).

But it is the United States, not GE, that is being myopic here. By ignoring the fact that other jurisdictions (like New Hampshire) impose taxes on the foreign subsidiary wherever it operates, New Hampshire creates a tax-induced incentive for New Hampshire dividend recipients to locate their dividend-paying subsidiaries within the State in order to avoid a second layer of tax on the dividends. Locating the subsidiary in any other jurisdiction would subject the subsidiary's operating income to tax where it operates and its dividends to a tax in New Hampshire. For that reason, every court that has considered a regime similar to New Hampshire's has found that it violates the Commerce Clause bar against discriminatory taxes, thereby precipitating a clear conflict with the decision below.

The source of the United States' myopia in this case is its failure to distinguish clearly between the separate company reporting regime at issue here and the purportedly "analogous" (U.S. Br. 13 n. 6) combined reporting regimes in cases on which it relies for its "aggregate" approach to the question presented. Moreover, even taken on its own terms, the United States' "aggregate" approach cannot mask the discrimination that underlies this case and its incompatibility with this Court's precedents and those of every state court that has considered the precise issue presented here. At the very least, it is incumbent upon this Court to resolve this conflict and to clear up the confusion and continuing controversy over the meaning of footnote 23 in *Kraft*, whose proper interpretation lies at the heart of this case.

I. AN "AGGREGATE" STANDARD FOR DETERMINING DISCRIMINATION IS NOT APPROPRIATE IN THIS CASE

The United States' brief in support of the "aggregate" standard for analyzing the discrimination at issue in this case rests squarely on a false analogy between the combined reporting regime that New Hampshire requires for domestic members of a unitary group and the separate reporting regime that New Hampshire requires for foreign subsidiaries.

Under a combined reporting regime, income of the group members is combined on a single return; intercompany transactions among group members (such as dividend payments) are disregarded; and the resulting income is apportioned to the taxing State. See Pet. 4. Under a separate reporting regime, by contrast, no income is combined. Each company files its own return; transactions between companies (such as dividend payments) are respected; and each company's income is separately apportioned to the taxing State. See Pet. 7. When a company filing under a separate reporting regime pays a dividend to a

company filing under a combined reporting regime, the separate reporting rules apply to the payment, even though all the companies involved may be engaged in a unitary business. Although such dividends would be disregarded if all the companies joined in a combined report, they are respected because "they constitute income to the ... combined group." Br. Opp. 8.

GE maintains that the proper analysis of the discrimination issue in this case must respect the separate company regime that New Hampshire has established for foreign subsidiaries and cannot be analyzed under an "aggregate" approach (such as that embraced by combined reporting). GE relies on the fact that this Court in *Kraft* flatly rejected the "aggregate" approach in the context of a separate reporting regime (like Iowa's there and New Hampshire's here) – by focusing on taxation of the respective dividend streams at issue without aggregating the tax liability of both the parent and the subsidiary. The United States argues, however, that "*Kraft* ... cannot plausibly be read, as GE would have it, to preclude consideration of the tax burden imposed by New Hampshire on the foreign subsidiary ...." U.S. Br. 11. The reason, according to the United States, was that "there was no 'independent basis' for taxing the foreign subsidiary in Iowa, because Iowa did not have a *unitary tax scheme*" (*id.* (emphasis supplied)), whereas "[u]nder the *unitary* approach to determination of taxable income, New Hampshire would have had an 'independent' basis for taxing ... the income of foreign subsidiaries doing no business in New Hampshire ...." *Id.* (emphasis supplied).

The foregoing statement illustrates the depth of the United States' confusion over the issues presented by the petition. First, every State *must* have a "unitary" approach to taxing income when, as in *Kraft* and this case, it seeks to include the dividends that a nondomiciliary parent (Kraft and GE) receive from their foreign subsidiaries. That is because

the constitutional predicate for a State's apportionment and taxation of the dividend income received by a nondomiciliary corporation is that the subsidiaries constitute part of the dividend recipient's "unitary" business conducted within the State. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 439 (1980) ("the linchpin of apportionability in the field of state income taxation is the unitary-business principle"). Consequently, the foreign subsidiaries in *Kraft*, like GE's foreign subsidiaries in this case, necessarily were part of the dividend recipient's unitary business, because Iowa or New Hampshire would otherwise have lacked the constitutional authority to include such dividends in the tax base to begin with. See *Kraft*, 505 U.S.at 72 (Kraft operated "a *unitary* business . . . in the United States and several foreign countries") (emphasis supplied).

Second, assuming that what the United States meant to say was that there was no "independent" basis under *Kraft* for taxing the foreign subsidiary in Iowa because Iowa did not have a *combined* reporting scheme for taxing unitary affiliates but New Hampshire would have had such an "independent" basis for taxing foreign subsidiaries under its *combined* approach, the United States simply ignores the indisputable fact of this case that New Hampshire's combined approach *prohibits* the inclusion of GE's foreign subsidiaries in the group. In short, the United States' analysis is based on a total misunderstanding of New Hampshire tax law.

Third, even if, contrary to the facts, New Hampshire had applied a combined reporting approach to taxing GE's unitary foreign subsidiaries, this would not have provided an "independent" basis for taxing GE's foreign subsidiaries that do no business in the State. This Court has clearly indicated that inclusion of a corporation within a combined group of unitary affiliates does *not* establish a nexus with – and, consequently, an "independent" basis for – taxing members

of the group who have no substantial contact with the State. *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 311-12 n.10 (1994). An "independent basis" for taxation within the meaning of *Kraft* footnote 23 can be established only by the subsidiary's taxable presence in the State through the conduct of business activities there.

In short, the United States' misreading of *Kraft* provides no basis for adoption of an "aggregate" approach.[1]

II. NEW HAMPSHIRE'S TAXING SCHEME DISCRIMINATES AGAINST GE EVEN UNDER THE "AGGREGATE" APPROACH OF THE UNITED STATES

Even assuming that it were appropriate to adopt the United States' "aggregate" approach to discrimination in this case, the discrimination against GE and its foreign subsidiaries would remain. Under the United States' approach, the appropriate inquiry focuses upon "the aggregate tax imposed upon a unitary business." U.S. Br. 8 (quoting Pet. App. 17a). Under this approach, according to

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[1] The United States suggests that all this is beside the point because GE could have avoided the discrimination inherent in New Hampshire's separate reporting regime by *electing* to file on a worldwide combined basis. U.S. Br. 12 n.5. This is simply wrong. The New Hampshire Department of Revenue Administration has promulgated rules that require the filing and signing of a "water's edge combined group" form, which automatically effect "the certification required by the statute." N.H. Admin. Rule Rev. §§ 307.07(g), 307.07(j). Accordingly, the only way a taxpayer may avoid the water's edge filing requirement is to fail to file and sign the required tax form, which is illegal. Indeed, none of the Department's tax forms or rules even suggests that there is any option or "election" to file other than the required water's edge combined return. The court below recognized this requirement when it observed that the "income of foreign members of the unitary business is excluded from the combined report if the foreign members qualify as an 'overseas business organization[].'" Pet. App. 3a.

the United States, there was no discrimination, "because there was no showing that 'the aggregate tax imposed upon a unitary business' would be higher if its foreign subsidiaries did no business in New Hampshire and lower if they did." *Id.* In other words, because New Hampshire would tax either the income earned by a unitary subsidiary doing business in New Hampshire (but not its dividends) or the dividends paid by a unitary subsidiary not doing business in New Hampshire, the two unitary businesses are in substance being treated the same.

The problem, of course, is that these two unitary businesses are *not* the same. One of the businesses has a subsidiary doing business in New Hampshire and the other does not. Just as it discriminates against interstate or foreign commerce to provide *different* (and better) *treatment* to *similarly situated* taxpayers based solely on their local activities, so it discriminates against interstate or foreign commerce to provide *similar treatment* to *differently situated* taxpayers based solely on their local activities. *See, e.g.*, *American Trucking Assns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987) (invalidating flat tax applied equally to all trucks because local trucks engaged in more in-state activity, and thus paid lower per mile tax, than out-of-state trucks). Thus, New Hampshire discriminates against foreign commerce by according essentially the same tax treatment to unitary businesses that have different levels of in-state activity.

The *American Trucking* case reveals an even more fundamental flaw in the New Hampshire scheme. The Court in *American Trucking* observed that the flat tax discriminated against interstate commerce because it was not "internally consistent," *i.e.*, if hypothetically replicated by every jurisdiction it would impose a greater burden on interstate than on intrastate commerce. *American Trucking*, 483 U.S. at 282-87. As this Court more recently described "the 'internal consistency' test ... that test asks, 'What would happen if all

States did the same?'" *American Trucking Assns, Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 437 (2005).

Because the protection afforded by the dormant Commerce Clause to foreign commerce "is broader than the protection afforded to interstate commerce," *Kraft*, 505 U.S. at 79; *see also Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979), New Hampshire's taxing regime plainly discriminates on its face against foreign commerce in violation of the internal consistency test. If every jurisdiction followed New Hampshire's lead and taxed corporations on both their operating income and their dividends, but provided a deduction for dividends reflecting income that had already been taxed in the hands of the payor, it is clear that parent-subsidiary structures involving foreign jurisdictions would bear a higher tax burden than those that confined their activities to a single State.

Indeed, the decisions of other state courts in direct conflict with the decision below have recognized that regimes indistinguishable from New Hampshire's violate the internal consistency test: As one of these courts observed, "the imposition of the dividends received deduction by every State would favor intrastate commerce over interstate commerce by giving a greater tax benefit to taxpayers investing in their home state corporations as opposed to out-of-state corporations or corporations engaged in multistate business." *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390, 400 (Cal. App. 2003), *cert. denied*, 540 U.S. 1178 (2004). *Accord, General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41, 57 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 139 P.3d 1183 (Cal. 2006); *D.D.I., Inc. v. State*, 657 N.W.2d 228, 234 (N.D. 2003).

III. THE DECISION BELOW CONFLICTS WITH *FULTON*, *BOSTON STOCK EXCHANGE*, AND THEIR STATE COURT PROGENY

The United States' effort to distinguish *Fulton* from the instant case suffers from the same confusion that infects the rest of its brief. According to the United States, *Fulton* involved a prohibited reduction in a property tax "based on a *separate* economic actor's level of in-state activity" (U.S. Br. 15 (emphasis in original) with "no unity of business between the issuing corporation and the taxpaying stockholder, and no equalization of burdens under a single taxing statute." *Id.* The tax here is different, says the United States, because "the allegedly discriminatory tax benefit pertained to the same tax and the same economic actor (*i.e.*, the unitary business)." *Id.* at 16.

But the United States' argument stumbles on its own premise. New Hampshire's tax as applied in the separate reporting context of this case does *not* apply to the "same tax" and the "same economic actor." The tax applies to two different taxpayers (or potential taxpayers) – the dividend recipient and the dividend payor. The United States' characterization of the tax as one on "the unitary business" once again reflects its confusion over a *combined* report, which arguably determines the tax of a single economic actor, and the separate returns filed by a parent and a subsidiary, who happen to be engaged in a unitary business. The fact that a State chooses to relieve one taxpayer of liability based on the liability of another taxpayer does not render the tax as one on the "unitary business."

The United States' attempt to distinguish *Boston Stock Exchange* fails for reasons similar to those described above in connection with *Fulton*. Although this Court condemned the State's effort in *Boston Stock Exchange* to "foreclose[] tax neutral decisions" by offering a tax benefit

for local activity (429 U.S. at 331) the United States contends that GE's "decision whether to have its foreign subsidiaries do business in New Hampshire was essentially tax-neutral" U.S. Br. 17. But this statement rests on the false assumption that New Hampshire imposes a single tax on a unitary business rather than a separate tax on the parent and subsidiary. Once that false assumption is removed, the position of the United States collapses, because the benefit offered the parent for moving its subsidiary into New Hampshire is conceptually indistinguishable from the benefit offered sellers of stock to move their stock sales into New York.

Finally, the United States' contention that there is no conflict between the decision below and the decision of the North Dakota and California courts invalidating dividend received deductions (DRDs) confined to dividends reflecting income on which tax has already been paid simply blinks reality. The United States denies that there is a conflict between *D.D.I.* and the decision below because the State in *D.D.I.* conceded that the taxing scheme facially discriminated against interstate commerce, and sought to defend the scheme only on the basis that it was compensatory. 657 N.W.2d at 231. In fact, the very same compensatory tax issues that were raised in *D.D.I.* were raised below (see Brief of General Electric at 18-20; Brief of Commissioner, Department of Revenue Administration at 29; Reply Br. of General Electric at 9-10), and the decision below rejecting these claims necessarily resolved them against GE, thereby creating an irreconcilable conflict with *D.D.I.*[2]

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[2] The United States' effort to distinguish the two cases on their facts borders on the frivolous. The difference in stock ownership requirements in the two cases is a distinction lacking constitutional significance. Pet. Rep. Br. 3. The suggestion that North Dakota could have taxed D.D.I., a nondomiciliary corporation, on dividends it received that did not constitute part of D.D.I.'s unitary business carried on in part in North

The United States does not even attempt to distinguish the California Court of Appeal cases that are irreconcilable with the decision below, but perfunctorily points to another California case involving *combined* reporting as somehow undercutting the conflict. U.S. Br. 19. As we have demonstrated at length above, the United States' effort to elide combined reporting regimes with separate company reporting regimes is a false analogy that permeates its entire brief. See also Pet. Rep. Br. 5-9.

IV. THE "OTHER FACTORS" IDENTIFIED BY THE UNITED STATES DO NOT COUNSEL AGAINST PLENARY REVIEW

The United States contends that the repeal of New Hampshire's statute and the alleged dispute over its proper interpretation counsel against review in this case. As GE has explained in its Reply to New Hampshire's Supplemental Brief in Opposition, the repeal of New Hampshire's statute has no impact New Hampshire's treatment of dividends, because the treatment is mandated by state constitutional law. For the same reason, the purported uncertainty surrounding the interpretation of the DRD statute is beside the point. New Hampshire's constitutional prohibition against double taxation of corporate income compels the treatment that GE claims is impermissibly discriminatory.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dakota (U.S. Br. 18 & n.8) is contrary to all controlling constitutional authority. See *supra* pp. 4-5. The goal of avoiding double taxation of corporate income in the hands of the payor and the payee was identical in both cases. Pet. Rep. Br. 3-4.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K STREET, NW
WASHINGTON, DC 20005
(202) 736-8000

WALTER HELLERSTEIN*
JEROME B. LIBIN
MARY E. MONAHAN
SUTHERLAND ASBILL
& BRENNAN LLP
1275 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
(202) 383-0100

BOBBY L. BURGNER
FRANK YANOVER
JOHN AMATO
GENERAL ELECTRIC
COMPANY
3135 EASTON TURNPIKE
FAIRFIELD, CT 06828
(203) 373-2501

WILLIAM F.J. ARDINGER
RATH, YOUNG AND
PIGNATELLI, P.C.
ONE CAPITAL PLAZA
CONCORD, NH 03302
(603) 226-2600

Counsel for Petitioner

*Counsel of Record

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

KELLY A. AYOTTE
Attorney General

ANN M. RICE*
Associate Attorney General
KAREN A. SCHLITZER
Assistant Attorney General
N.H. DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-1264

JOHN F. HAYES
Revenue Counsel
KATHLEEN J. SHER, ESQ.
N.H. DEPARTMENT OF REVENUE ADMINISTRATION
45 Chenell Drive
Concord, NH 03301
(603) 271-2191

Counsel for Respondent
**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether N.H. Rev. Stat. Ann. § 77-A:4, IV facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

STATUTES

N.H. Legislative Service, 2007 Legislative Session, No. 3, Ch. 146, H.B. 598:

AN ACT repealing certain foreign dividend deductions under the business profits tax and repealing an exemption to the real estate transfer tax.

Be it Enacted by the Senate and House of Representatives in General Court convened:

146:1 Repeal. The following are hereby repealed:

I. RSA 77-A:4, IV, relative to a corporate deduction of gross business profits derived from dividends paid to the parent by a subsidiary whose gross business profits have already been subject to taxation.

II. RSA 77-A:4, V, relative to a joint venture and partnership deduction of gross business profits derived from distributions from the joint venture or partnership to another business organization and which have already been subject to taxation.

III. RSA 77-A:4, VI, relative to corporate deduction of a distribution to a parent company by a domestic international sales corporation where the profits from which the distribution is made have already been subject to taxation.

IV. RSA 78-B:2, XIX, relative to an exemption from real estate transfer tax for transfers of title pursuant to merger, consolidation, or reorganization

of 2 or more Internal Revenue Code section 501(c)(3) or 501(c)(2) organizations.

146:2 Effective Date. This act shall take effect 60 days after its passage.

(Approved: June 18, 2007)

(Effective Date: August 17, 2007)

SUMMARY OF THE ARGUMENT

New Hampshire Rev. Stat. Ann. § 77-A:4, IV has been repealed, providing further demonstration of the hypothetical nature of the Petitioner's claim. Accordingly, the decision of the New Hampshire Supreme Court does not warrant certiorari review.

ARGUMENT

New Hampshire Rev. Stat. Ann. § 77-A:4, IV has been Repealed, Further Demonstrating that this Case is a Hypothetical and does not Warrant Certiorari Review.

Subsequent to the filing of Respondent's Brief in Opposition, the New Hampshire legislature repealed N.H. Rev. Stat. Ann. § 77-A:4, IV. *See* N.H. Legislative Service No. 3, Ch. 146 (H.B. 598) 160th Sess. (2007) (repealing N.H. Rev. Stat. Ann. § 77-A:4, IV June 18, 2007, eff. Aug. 17, 2007). The repeal of this

statute provides further demonstration that certiorari review is not warranted.

According to the legislative committee reporting on the new legislation, repealing the statutory provisions was "necessary to avoid confusion and prevent the opportunity for potential abuse." *See* H. H.B. 598-FN-A, 1st yr. of 160th Sess. (N.H. Mar. 21, 2007, House Journal No. 9, 885). In support of the repeal, the Commissioner of the Department of Revenue Administration testified that the statutory subsections of N.H. Rev. Stat. Ann. § 77-A:4 proposed for repeal have been unnecessary since New Hampshire adopted the unitary theory of taxation and should therefore be repealed. *See Repealing Certain Foreign Dividend Deductions Under the Business Profits Tax and Repealing an Exemption to the Real Estate Transfer Tax: Hearing on H.B. 598-FN-A Before the House Ways and Means Comm.*, 2007 Sess., Feb. 16, 2007 (testimony of G. Philip Blatsos, Commissioner of the Department of Revenue Admin., at http://www.gencourt.state.nh.us/house/committees/committee_audio/hearingaudio.aspx?commcode=H28, beginning at 3:08). Further, the harm N.H. Rev. Stat. Ann. § 77-A:4, IV was intended to protect against, the threat of double taxation, is addressed through federal constitutional law, state case law, and N.H. Rev. Stat. Ann. § 77-A itself, *see, e.g.*, N.H. Rev. Stat. Ann. § 77-A:4, X.

CONCLUSION

For the foregoing additional reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

KELLY A. AYOTTE
Attorney General

ANN M. RICE*
Associate Attorney General
KAREN A. SCHLITZER
Assistant Attorney General
N.H. DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-1264

Counsel for Respondent
**Counsel of Record*

JOHN F. HAYES
Revenue Counsel
KATHLEEN J. SHER, ESQ.
N.H. DEPARTMENT OF
REVENUE ADMINISTRATION
45 Chenell Drive
Concord, NH 03301
(603) 271-2191

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No. 06-1210

IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE
DEPARTMENT OF REVENUE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K STREET, NW
WASHINGTON, DC 20005
(202) 736-8000

WALTER HELLERSTEIN*
JEROME B. LIBIN
MARY E. MONAHAN
SUTHERLAND ASBILL
& BRENNAN LLP
1275 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
(202) 383-0100

BOBBY L. BURGNER
FRANK YANOVER
JOHN AMATO
GENERAL ELECTRIC
COMPANY
3135 EASTON TURNPIKE
FAIRFIELD, CT 06828
(203) 373-2501

WILLIAM F.J. ARDINGER
RATH, YOUNG AND
PIGNATELLI, P.C.
ONE CAPITAL PLAZA
CONCORD, NH 03302
(603) 226-2600

Counsel for Petitioner

September 25, 2007 *Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

After this Court invited the Solicitor General to express the views of the United States in this case, *General Electric Company* v. *Commissioner, New Hampshire Department of Revenue Administration*, No. 06-1210, Order of May 21, 2007, New Hampshire repealed, effective August 17, 2007, the statute that denied petitioner the right to a

dividends received deduction (DRD) for dividends received from its foreign subsidiaries, because the foreign subsidiaries did not conduct income-producing activity in New Hampshire. New Hampshire has now filed a supplemental brief arguing that the statute's repeal "[d]emonstrat[es] that this Case is a Hypothetical and does not Warrant Certiorari Review." Resp. Supp. Br. Opp. 2. Respondent's eleventh-hour effort to avoid this Court's review lacks substance.

ARGUMENT

I. THE REPEAL OF NEW HAMPSHIRE'S DRD STATUTE HAS NO IMPACT ON THE PROSPECTIVE TREATMENT OF DIVIDENDS IN NEW HAMPSHIRE AND THEREFORE DOES NOT LIMIT THE SIGNIFICANCE OF THIS CASE

The repeal of New Hampshire's DRD statute does not affect the continuing significance of the issues raised by this case. Because the DRD statute simply implements a state constitutional bar against double taxation, a point the New Hampshire Supreme Court has consistently recognized, the state constitutional mandate produces the same discriminatory treatment of foreign subsidiary dividends as the recently repealed statute. As the New Hampshire court declared in *First Financial Group of New Hampshire, Inc. v. State*, 430 A.2d 162 (N.H. 1981):

> In *Concord Inv. Corp. v. N.H. Tax Comm'n*, 114 N.H. at 109, 316 A.2d at 195, we stated that when a wholly-owned subsidiary pays a business profits tax and then passes those post-tax profits through to its parent in the form of dividends, the parent will not be required to pay a business profits tax on the dividends. This is so not only because RSA 77-A:4 [the DRD statute] precludes such a result, *but, more*

> *importantly, because "[t]he incidence of the two taxes would be so nearly identical as to result in double taxation of a sort which is not permitted under our Constitution." Concord Inv. Corp. v. N.H. Tax Comm'n*, 114 N.H. at 109, 316 A.2d at 195 (quoting *Opinion of the Justices*, 84 N.H. 559, 577, 149 A. 321, 330 (1930)).

430 A.2d at 165 (emphasis supplied).

Accordingly, the same issue raised by the decision below arises even in the absence of a statutory provision granting a DRD limited to dividends received from foreign subsidiaries doing business and generating taxable income in New Hampshire. Thus, *regardless of any statutory provision for a DRD*, "when a wholly-owned subsidiary pays a business profits tax and then passes those post-tax profits through to its parent in the form of dividends, the parent will not be required to pay a business profits tax on those dividends." *First Financial Group*, 430 A.2d at 165. Indeed, respondent itself effectively acknowledges this conclusion in declaring that "*the harm that [the repealed statute] was intended to protect against, the threat of double taxation, is addressed through ... state case law....*" Resp. Supp. Br. Opp. 3 (emphasis applied). This constitutional requirement for a DRD has continuing force in all situations where the New Hampshire Business Profits Tax statute requires a dividend-paying subsidiary to file a separate tax return, as in this case where the statute requires the foreign subsidiary to file a separate return. RSA 77-A:1, XIV.

Based on controlling state constitutional law, GE would therefore make the same argument that it has made throughout this case, namely, that if GE's foreign subsidiaries had been doing some business in New Hampshire, GE would not have been required to pay a tax on some portion of the dividends received from those

subsidiaries. However, because GE's subsidiaries do business only abroad, GE is not entitled to a deduction or exemption with respect to *any portion* of the dividends it receives from its foreign subsidiaries. That differential treatment constitutes discrimination against foreign commerce in violation of the Commerce Clause.

In short, the discriminatory treatment of dividends paid by foreign corporations not doing business in New Hampshire, along with the conflict between the decisions of the highest courts of New Hampshire and North Dakota, will continue unabated if the decision below is permitted to stand, notwithstanding the last minute repeal of the statute.

II. THIS CASE IS NOT "A HYPOTHETICAL"

Respondent's contention that the *prospective* repeal of New Hampshire's DRD statute renders this case "a Hypothetical" (Resp. Supp. Br. Opp. 2) is baseless. The statute was indisputably in force during the ten tax years at issue (1990-1999). Respondent has admitted "the Foreign Dividend Issue exists and applies to GE in each of the Tax Years." See Pet. App. 52a, 61a (petitioner's complaint ¶ 11 and respondent's unqualified admission thereto). Respondent has further admitted that "[p]ursuant to the Settlement Agreements, the parties have agreed and stipulated that if the Foreign Dividend Issue is resolved in GE's favor, the Department will pay a refund to GE with respect to all of the Tax Years in the aggregate amount of $3,154,738." *Id.* In short, the parties themselves have agreed that GE suffered real harm in this case and have gone so far as to quantify the precise amount of such harm. There is nothing about the prospective repeal of New Hampshire's DRD statute that renders this harm hypothetical.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K STREET, NW
WASHINGTON, DC 20005
(202) 736-8000

WALTER HELLERSTEIN*
JEROME B. LIBIN
MARY E. MONAHAN
SUTHERLAND ASBILL
& BRENNAN LLP
1275 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
(202) 383-0100

BOBBY L. BURGNER
FRANK YANOVER
JOHN AMATO
GENERAL ELECTRIC
COMPANY
3135 EASTON TURNPIKE
FAIRFIELD, CT 06828
(203) 373-2501

WILLIAM F.J. ARDINGER
RATH, YOUNG AND
PIGNATELLI, P.C.
ONE CAPITAL PLAZA
CONCORD, NH 03302
(603) 226-2600

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No. 06-1210

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REPLY BRIEF FOR PETITIONER

BOBBY L. BURGNER
FRANK YANOVER
JOHN AMATO
GENERAL ELECTRIC COMPANY
3135 Easton Turnpike
Fairfield, CT 06828
(203) 373-2501

WALTER HELLERSTEIN *
JEROME B. LIBIN
MARYANN H. LUONGO
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

WILLIAM F.J. ARDINGER
RATH, YOUNG AND PIGNATELLI, P.C.
One Capital Plaza
Concord, NH 03301
(603) 226-2600

Counsel for Petitioner

* Counsel of Record

May 7, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 STATEMENT

Petitioner has set forth its Rule 29.6 statement in its petition for certiorari filed *March* 2, 2007.

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REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition pays scant attention to the central question here presented—whether the decision below can be reconciled with this Court's decision in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), and *Fulton's* state court progeny. Those cases all condemn as facially discriminatory tax deductions that are inextricably linked to the conduct of in-state business activity. Instead, respondent devotes most of his effort to defending an "aggregate" standard for determining tax discrimination that would look beyond the challenged tax to other taxes imposed on other taxpayers.

As we demonstrate below, respondent's failure seriously to address the conflicting decisions at the heart of this case is explained by the simple fact that the decisions are not reconcilable. Moreover, the "aggregate" standard on which respondent relies—a standard other courts have applied only when the discrimination at issue compares income streams

subject in one instance to combined reporting and in the other to separate reporting—has no role to play here because the State has excluded foreign subsidiaries from combined reporting and as a result has created a "separate" reporting environment for such entities. Finally, respondent's suggestion that this case is hypothetical and that GE has not been harmed is belied by his explicit recognition that GE would receive a dividends received deduction (DRD) if its foreign subsidiaries conducted income-generating business in New Hampshire and his agreement to pay GE its stipulated refund if GE prevails on the merits.

The repatriation of income from foreign subsidiaries is a significant aspect of U.S. multinational operations. No State should be allowed to tax in a discriminatory manner the dividends paid by such entities to their U.S. parent companies. This Court's review of the instant case is necessary to resolve the conflict that now exists among the state courts on the important question here presented.

I. THE DECISION BELOW CANNOT BE RECONCILED WITH *FULTON* AND ITS STATE COURT PROGENY

Fulton squarely holds that a tax deduction provided to a corporate shareholder based on the amount of activity the underlying corporation conducts in the taxing State facially discriminates against interstate commerce. To avoid the conclusion that New Hampshire's DRD similarly discriminates against foreign commerce, respondent suggests that *Fulton* is "not analogous" because the deduction allowed in calculating North Carolina's intangible property tax "was available against the stock of all corporations to the extent that their income was taxable in that state." Br. Opp. 17. New Hampshire's DRD is said to be different because it is "available only to parents of affiliates that own 80% of a subsidiary and only to the extent that the subsidiary had paid business tax on the same income distributed by the dividend." *Id.*

The 80% ownership requirement is a distinction without any constitutional significance. The fact that New Hampshire's discriminatory DRD is available to a more limited class of shareholders than was the case in *Fulton* is no defense to a claim of Commerce Clause discrimination. As this Court has declared, "[a]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether the discrimination has occurred." *Associated Industries of Missouri* v. *Lohman*, 511 U.S. 641, 650 (1994). *See also Maryland* v. *Louisiana*, 451 U.S. 725, 760 (1981).

The fact that New Hampshire's DRD is available only to the extent the subsidiary has paid tax "on the same income distributed by the dividend" (Br. Opp. 17) is an equally invalid point of distinction. In fact, *Fulton* rejected a virtually identical argument. North Carolina defended its discriminatory tax deduction by asserting that the higher tax burden on shareholders owning stock in corporations doing less business in North Carolina compensated for the greater corporate income tax that corporations doing more business in North Carolina would pay to the State. See *Fulton*, 516 U.S. at 334. This Court dismissed the compensatory tax argument as "unconvincing." *Id.* at 335. Respondent's argument here is also unconvincing. To paraphrase this Court's conclusion in *Fulton*: "A regime that taxes [a dividend] only to the degree that its [paying] corporation participates in [foreign] commerce . . . tends, at least, to discourage [all] corporations from plying their trades in [foreign] commerce." *Id.* at 334.

Respondent's efforts to distinguish the state cases in direct conflict with the decision below are equally unpersuasive. Thus, respondent attempts to distinguish *D.D.I., Inc.* v. *North Dakota*, 657 N.W.2d 228 (N.D. 2003), first, on the same untenable ground on which it sought to distinguish *Fulton*, namely, that New Hampshire's discriminatory DRD "only applies to dividends from subsidiaries that own a minimum of

80% of the subsidiaries' stock," whereas North Dakota's DRD applied "regardless of stock ownership." Br. Opp. 21, 22.

Second, respondent purports to find a difference between *D.D.I.* and the instant case by asserting that New Hampshire's taxation of foreign dividends "is predicated upon the foreign subsidiary being part of the unitary business conducted in New Hampshire." *Id.* at 22. In the case of a nondomiciliary taxpayer (such as D.D.I. or GE), of course, a State may not apportion and tax dividends received unless they arise from a unitary business conducted by the taxpayer within the State. See p. 8, note 3, *infra*. The dividends North Dakota sought to tax in *D.D.I.* were held to be apportionable. They thus necessarily arose from the conduct of a unitary business in North Dakota, just as the dividends that New Hampshire is seeking to tax here arose from the conduct of GE's unitary business in New Hampshire.

Finally, respondent asserts that *D.D.I.* is inapposite because "it did not consider a dividend received deduction in the context of a water's edge combined reporting tax regime." Br. Opp. 22. This attempted distinction also misses the mark. Whether or not *D.D.I.* involved combined reporting, New Hampshire's water's edge combined reporting regime is, as explained more fully below, simply not relevant to its taxation of foreign subsidiary dividends.

Respondent next attempts to distinguish the discriminatory DRDs that California courts struck down in *Ceridian Corp.* v. *Franchise Tax Bd.*, 102 Cal. Rptr. 2d 611 (1st Dist. 2000); *Farmer Bros. Co.* v. *Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Ct. App. 2003), *cert. denied*, 540 U.S. 1178 (2004); and *General Motors Corp.* v. *Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (2d Dist. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006). This attempt further underscores the weakness of his case. Respondent asserts that the California cases are distinguishable because the DRDs at issue in those cases were limited to dividends

paid from California sources, whereas New Hampshire's DRD is allowed "regardless of the source of the income." Br. Opp. 22, 23, 24.

On this point, respondent is contradicted not only by his own statute and the interpretation given to it by the court below, *but also by his own Brief in Opposition*, which categorically states that the DRD is available "only to the extent that the subsidiary has paid business tax on the same income distributed by the dividend." Br. Opp. 17. Since a foreign subsidiary pays business tax only on income derived from New Hampshire sources, foreign subsidiary dividends eligible for a DRD in New Hampshire *must* have their source in New Hampshire.

In short, respondent's asserted points of distinction do nothing to negate the fact that the decision below stands in conflict with both *Fulton* and the decisions of the courts of North Dakota and California as well.

II. AN "AGGREGATE" STANDARD FOR DETERMINING DISCRIMINATION IS NOT APPROPRIATE IN THIS CASE

Respondent's defense of an "aggregate" standard for determining state tax discrimination here—a standard that looks to the "aggregate tax paid" (Br. Opp. 18) on the relevant incomes of both a parent and its subsidiary—rests squarely on a false analogy between the combined reporting regime that New Hampshire and other states provide for *domestic* members of a unitary group and the separate reporting regime that New Hampshire and other states provide for *foreign* subsidiaries.

Under a combined reporting regime, income of the group members is combined on a single return; intercompany transactions among group members (e.g., dividend payments) are disregarded; and the resulting income is apportioned to the taxing State. See Pet. 4. Under a separate reporting regime, by contrast, no income is combined. Each company files its

own return; transactions between companies (e.g., dividend payments) are respected; and each company's income is separately apportioned to the taxing State. See Pet. 7.

When, as in this case, a separate reporting company pays a dividend to a combined reporting company, the separate reporting rules apply, even though both companies may be engaged in a unitary business. In such a case, the dividend is respected and is reported as income of the combined group. Br. Opp. 8. The same result obtains when, as is also the case here, a dividend is paid by a foreign subsidiary not required to file a return with the State because it does no business there. (As previously noted, respondent fails to recognize that by excluding all foreign subsidiaries from the combined group, the State has created a separate reporting environment for such entities. They either file separately or not at all.)

In contrast to a case like this, in which dividend payments are made entirely in a separate reporting environment, claims of discrimination have also arisen when foreign subsidiaries filing separately (or not filing at all) pay dividends to a domestic member of a combined group. The basic contention is that the State discriminates against foreign commerce by taxing the foreign subsidiary dividends as income of the combined group, while disregarding the dividends paid by domestic subsidiaries within the group. In this context, *and only this context*, some courts have endorsed an "aggregate" standard for determining the existence of discrimination. They have compared the "aggregate tax" imposed on a combined group that includes a domestic subsidiary paying dividends with the "aggregate tax" imposed on a combined group with a foreign subsidiary paying dividends.

Every case that Respondent cites as authority for application of the "aggregate" approach to discrimination falls within the fact pattern just described.[1] *But that fact pattern has*

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[1] *Fujitsu IT Holdings, Inc. v. Franchise Tax Bd.*, 15 Cal. Rptr. 3d 473 (Cal. App. 2004) (sustaining tax on dividends from foreign payor because

nothing to do with the facts of this case. This case does not involve a claim of discrimination with respect to a foreign dividend payor filing separately and a domestic dividend payor included in the combined report. Rather, this case involves dividends paid by two classes of foreign subsidiaries that are not part of the combined group (Br. Opp. 5), one of which files a separate return (*id.* 9 n.7), the other of which files no return.

In the context of this case, there is no warrant for the "aggregate" approach espoused by respondent because there is no combined report involved, and, accordingly, nothing to aggregate.[2] Instead, the required approach here is the straightforward comparison of the relative tax burden on the two dividend streams under separate reporting. In the context of a separate reporting regime, every court—including this Court—has rejected the "aggregate" standard for determining the existence of discrimination.

As described in detail in the petition (Pet. 9-10, 17-19), this Court in *Kraft General Foods, Inc.* v. *Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992), addressed an

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income of domestic dividend payor is included in tax base under combined report); *Bernard Egan & Co. v. State Dep't of Revenue*, 769 So. 2d 1060 (Fla. Dist. Ct. App. 2000), *rev. denied*, 790 So. 2d 1101 (Fla.), *cert. denied*, 534 U.S. 995 (2001) (same, under consolidated return); *Appeal of Morton Thiokol, Inc.*, 864 P.2d 1175 (Kan. 1993) (same, under combined report); *E.I. Dupont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82 (Me. 1996) (same, under combined report); *Caterpillar, Inc. v. Commissioner of Revenue*, 568 N.W.2d 695 (Minn. 1997), *cert. denied*, 522 U.S. 1112 (1998) (same for foreign interest and royalty payments, under combined report).

[2] Indeed, combined reporting is essentially irrelevant to this case, a point completely missed by the court below. GE would have had precisely the same claim as it is advancing here if it had filed a separate report in New Hampshire (as it would have done if it had only foreign subsidiaries) and had received dividends from its foreign subsidiaries, some of which did business and paid BPT in New Hampshire and some of which did not.

argument that in substance is identical to the argument respondent advances here. In *Kraft*, which involved Iowa's separate reporting regime, this Court observed that there arguably would be no discrimination "[i]f one were to compare the *aggregate* tax imposed by Iowa on a unitary business which included a subsidiary doing business throughout the United States (including Iowa) with the *aggregate* tax imposed by Iowa on a unitary business which included a foreign subsidiary doing business abroad," because "Iowa would tax an apportioned share of the domestic subsidiary's entire earnings, but would tax only the amount of the foreign subsidiary's earnings paid as a dividend to the parent." *Id.* at 80 n.23 (emphasis supplied).[3]

This Court then flatly rejected the "aggregate" approach in the context of a separate reporting regime like Iowa's, because in that context "the Iowa operations of the subsidiary provide an *independent* basis for taxation not present in the case of the foreign subsidiary." *Id.* (emphasis supplied). Accordingly, the appropriate approach in a separate reporting context, which is precisely the approach that GE has adopted here, is to evaluate the discrimination claim by focusing only

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[3] Part of the confusion surrounding footnote 23 may be attributable to some courts misreading this Court's reference to a "unitary business" as being an implicit reference to a combined report. Indeed, the court below committed this very error. See Pet. App. 15a (characterizing *Kraft* footnote 23 as "distinguishing between a single entity filing system . . . and a combined reporting method system"). In fact, this Court explicitly noted earlier in its opinion in *Kraft* that "Iowa is not a State that taxes an apportioned share of the entire income of a unitary business without regard for formal lines." *Id.* at 74 n.9. The discussion in footnote 23 must be read in that context. This Court's reference to the "unitary" aspect of the business in footnote 23 is no doubt explained by the fact that Kraft conducted a unitary business in Iowa and because Iowa lacked the constitutional power to include in the state's apportionable tax base any dividends received by a nondomiciliary corporation like Kraft unless they arose out of a unitary business conducted in the State. See *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 439 (1980).

on the taxation of the respective dividend streams, without "aggregating" the tax liability of both parent and subsidiary.

Subsequent to *Kraft*, state courts addressing allegations of discrimination in the treatment of dividends under separate reporting regimes have likewise rejected the "aggregate" standard. This is clear from the very cases respondent cites as recognizing—but *not* applying—the "aggregate" approach.[4]

In short, in a case such as this, involving two dividend streams and a separate return context, no court other than the court below has aggregated the tax paid by two separate entities (the dividend payor *and* the dividend recipient) in testing for discrimination.

III. GE HAS SUFFERED REAL HARM IN THIS CASE

Respondent's contention that this "Court should not review this case because Petitioner has not been harmed in any way," is Kafkaesque. Br. Opp. 24-25. Respondent's claim that GE's harm is "purely hypothetical" cannot be squared with its

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[4] *Hutchinson Technology, Inc. v. Commissioner of Revenue*, 698 N.W.2d 1 (Minn. 2005) (invalidating tax discrimination against foreign dividends under Commerce Clause based on a comparative analysis of the tax treatment of dividends paid under separate reporting regime without regard to any "aggregate" analysis of parent and subsidiary liability); *Conoco, Inc. v. Taxation and Revenue Department*, 931 P.2d 730 (N.M. 1996), *cert. denied*, 521 U.S. 1112 (1997) (invalidating tax discrimination against foreign dividends under Commerce Clause based on a comparative analysis of the tax treatment of dividends paid under separate reporting regime, and explicitly distinguishing cases involving combined reporting regimes which include a "portion of the domestic subsidiaries' income in the tax base of the parent"); *Emerson Elec. Co. v. Tracy*, 735 N.E. 2d 445 (Ohio 2000) (invalidating tax discrimination against foreign dividends under *Kraft* based on a comparative analysis of tax treatment of dividends paid under separate reporting regime and explicitly distinguishing combined reporting cases, noting that, with respect to subsidiaries under consideration, "Ohio's tax system does not differ from the single-entity reporting system involved in *Kraft*").

unqualified admission that "the Foreign Dividend Issue exists and applies to GE in each of the Tax Years," and that "[p]ursuant to the Settlement Agreements, the parties have agreed and stipulated that if the Foreign Dividend Issue is resolved in GE's favor, the Department will pay a refund to GE with respect to all of the Tax Years in the aggregate amount of $3,154,738." (See paragraph 11 of GE's complaint, Pet. 52a, and respondent's unqualified admission in its answer, Pet. 61a.)

In other words, the parties themselves have agreed that GE suffered real harm and have agreed on the precise value of GE's injury (the amount of the illegally collected tax) in the settlement agreements that preserved the issue of constitutionality of New Hampshire's DRD for litigation. See Pet. 2a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BOBBY L. BURGNER
FRANK YANOVER
JOHN AMATO
GENERAL ELECTRIC COMPANY
3135 Easton Turnpike
Fairfield, CT 06828
(203) 373-2501

WALTER HELLERSTEIN *
JEROME B. LIBIN
MARYANN H. LUONGO
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

WILLIAM F.J. ARDINGER
RATH, YOUNG AND PIGNATELLI, P.C.
One Capital Plaza
Concord, NH 03301
(603) 226-2600

Counsel for Petitioner

* Counsel of Record

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No. 06-1210

In the Supreme Court of the United States

GENERAL ELECTRIC COMPANY, PETITIONER

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RICHARD T. MORRISON
Acting Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
JONATHAN L. MARCUS
Assistant to the Solicitor General
KENNETH L. GREENE
FRANCESCA U. TAMAMI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether New Hampshire discriminates against foreign commerce in violation of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, by allowing the parent of an affiliated group of corporations to deduct, for purposes of determining taxable business profits, "such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary * * * whose gross business profits have already been subject to [New Hampshire's business profits tax] during the same taxable period." N.H. Rev. Stat. Ann. § 77-A:4, IV.

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In the Supreme Court of the United States

No. 06-1210

GENERAL ELECTRIC COMPANY, PETITIONER

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COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. New Hampshire imposes a business profits tax (BPT) on business organizations that carry on business within the State. N.H. Rev. Stat. Ann. §§ 77-A:1, 77-A:2, 77-A:6, I. Such organizations are generally taxed as separate entities, but combined reporting is required for any "unitary business," *i.e.*, "one or more related business organizations engaged in business activity both within and without [the] state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions." *Id.* §§ 77-A:1, I, XIV and XV, 77-A:6, IV. Under the combined reporting method,

the income of all organizations comprising the unitary business, other than "overseas business organizations," is aggregated. *Id.* § 77-A:1, XV and XVI. "Overseas business organizations" are "business organizations with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia." *Id.* § 77-A:1, XIX. Thus, the combined report effectively includes only the net income of the domestic members of the unitary group, *i.e.*, the "water's edge combined group."[1] *Id.* § 77-A:1, XV. Although a foreign subsidiary is not considered part of the water's edge combined group, it may still qualify as a unitary member. *Id.* § 77-A:1, XIV and XV; Pet. App. 3a.

Any dividends paid from one member of the combined group to another are ignored in calculating the group's gross profits. Pet. App. 4a; N.H. Rev. Stat. Ann. § 77-A:3, I. The gross profits are then apportioned to the State pursuant to a statutory formula. *Id.* § 77-A:3. Any dividends paid by foreign subsidiaries that are members of the unitary group (but not the water's edge group) are apportioned separately and then added to the gross profits to produce "New Hampshire taxable business profits," which are taxed at the applicable rate. *Id.* §§ 77-A:2, A:3, II(b) and (b)(6).

Under a separate provision, N.H. Rev. Stat. Ann. § 77-A:4, IV (subsection IV), a parent corporation was permitted to deduct dividends received from a subsidiary of which the parent controls 80% of the stock, if the subsidiary paid BPT on its net profits during the same tax period. That provision authorized the following deduction:

> In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the

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[1] Consistent with the parties' terminology (Pet. 4; Br. in Opp. 4), this brief will refer to overseas business organizations as foreign subsidiaries or foreign members, and non-overseas business organizations as domestic subsidiaries or domestic members.

> United States Internal Revenue Code[2] as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

Subsection IV. That dividends-received deduction "has traditionally been used by corporations with affiliates or subsidiaries that file separately, and not under the combined reporting method." Pet. App. 5a. The deduction was triggered only when, and to the extent that, the subsidiary's profits for the relevant tax period had been subjected to the BPT.[3] *Id.* at 11a-12a; Br. in Opp. 3, 9.

2. Petitioner General Electric Co. (GE) is a New York corporation with its principal place of business in Connecticut. GE and its subsidiaries conduct a unitary business throughout the United States and in certain foreign countries. Pet. App. 2a, 3a. During the tax years at issue (1990-1999), certain of GE's subsidiaries (hereinafter, its "foreign subsidiaries") did no business within the United States but were part of GE's unitary group and paid dividends to GE and its affiliates that were doing business within the United States. *Id.* at 3a, 53a-54a; Pet. 6.

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[2] Chapter 6 of the Internal Revenue Code provides rules for filing consolidated returns. A consolidated return generally may be filed by an affiliated group of corporations, connected through stock ownership of at least 80%, with a common parent. 26 U.S.C. 1504(a); see 26 U.S.C. 243(a)(3) and (b) (dividends-received deduction for affiliated groups).

[3] Subsection IV was repealed on June 18, 2007. The repeal was effective August 17, 2007. H.B. 598-FN-A, 2007 Sess. (N.H.) <http://gencourt.state.nh.us/legislation/2007/hb0598.html>.

GE has a place of business in New Hampshire (Pet. App. 50a) and is required to file a BPT return. See N.H. Rev. Stat. Ann. §§ 77-A:1, 77-A:2, 77-A:6, I. For the tax years at issue, GE used the combined reporting method to apportion the income of its unitary business to New Hampshire and calculate its BPT. Pet. App. 54a. Pursuant to New Hampshire law, GE paid BPT on an apportioned share of the dividends received by the water's edge group from its foreign subsidiaries.

GE sought a refund from respondent for the tax years in question, claiming that it had overpaid its BPT because it should have been, but was not, permitted to deduct the foreign dividends paid to the water's edge combined group in calculating taxable business profits. GE contended that subsection IV unconstitutionally discriminated against foreign commerce by granting a dividends-received deduction for dividends from foreign subsidiaries only when those subsidiaries do business in New Hampshire. The parties thereafter agreed that if it was determined that GE was entitled to the deduction, respondent would refund GE $ 3,154,738. Pet. App. 52a. Respondent denied GE's refund request. *Id.* at 53a.

3. GE sought judicial review in state superior court, which dismissed for lack of standing and rejected GE's claim on the merits. Pet. App. 22a-43a, 44a-49a. The court stated that GE "cannot escape the fact that it is a unitary business that filed a combined return for the tax years at issue and the plain and unambiguous language contained in [subsection IV] does not specifically address that type of business scenario." *Id.* at 32a-33a. The court therefore concluded that "[a]bsent a showing that [subsection IV] directly and specifically affects its rights, [GE] does not have standing to bring this lawsuit." *Id.* at 34a. In the alternative, the court held that "even assuming *arguendo* that [GE] has standing to bring this lawsuit, [GE]

fails to demonstrate how [subsection IV] is unconstitutional." *Id.* at 35a.

4. The Supreme Court of New Hampshire affirmed in part and reversed in part. Pet. App. 1a-21a. With respect to standing, the court concluded that the plain language of subsection IV made the dividends-received deduction available to the "parent of an affiliated group," as defined by the Internal Revenue Code, and held that GE met that definition. *Id.* at 6a-7a. The court further stated that "standing is conferred upon [GE] to challenge the statute for the very reason that it was denied the statute's benefit." *Id.* at 8a.

Turning to the constitutional question, the supreme court stated that this case involves a "hypothetical factual scenario" because GE "does not have any foreign subsidiaries that conduct business in the state" and "[i]t is uncertain, therefore, exactly how the state taxing regime, including [subsection IV], would operate if it did." Pet. App. 10a. The court noted respondent's insistence that subsection IV "never enters the analysis in a combined reporting regime," but declined to resolve the question. *Ibid.* Instead, the court "assume[d] without deciding that the parent of a foreign subsidiary doing business in the state might, under certain circumstances, be entitled to the dividend-received deduction in [subsection IV]." *Id.* at 10a-11a.

The supreme court then concluded that subsection IV did not facially discriminate against foreign commerce. Pet. App. 12a-21a. The court distinguished this case from *Kraft General Foods, Inc.* v. *Iowa Department of Revenue & Finance*, 505 U.S. 71 (1992), in which this Court struck down Iowa's taxing scheme that allowed a dividends-received deduction for dividends received from domestic, but not foreign, subsidiaries that did no business in Iowa and were not subject to Iowa's income tax. Pet. App. 14a-17a. The New Hampshire court reasoned that, in note 23 of the *Kraft* opinion, "the Court dis-

tinguishes between a single entity filing system [such as Iowa's] where income from out-of-state domestic subsidiaries is not taxed at all and a combined reporting method system where out-of-state domestic income is taxed through apportionment." *Id.* at 15a.

Relying on the principle that "a proper analysis must take the whole scheme of taxation into account," the court "assess[ed] New Hampshire's taxing regime as a whole" by examining "the aggregate tax imposed upon a unitary business," and found "no improper discriminatory treatment." Pet. App. 17a (quoting *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69 (1963)). The court observed that, in the case of a foreign subsidiary doing business in New Hampshire, the foreign subsidiary "must pay a tax apportioned upon its profits attributable to the state," but that "[a]ny dividends paid to a parent corporation also located within the state may be deducted * * * up to the amount of business profits already taxed," thus ensuring "that the income of the [unitary] business entity is taxed only once." *Id.* at 18a. The court determined that "[a]lthough the in-state parent is not taxed directly * * *, because by nature of the unitary business concept the parent and its subsidiary are considered a single business entity, it follows that the parent ultimately pays the BPT of its subsidiary." *Ibid.*

When, as in GE's situation, the foreign subsidiary does no business in New Hampshire, the court explained that the subsidiary "is not subject to the BPT and its income is therefore not directly taxed," but "any dividends paid to an in-state parent corporation are apportioned and taxed as income." Pet. App. 18a. The parent corporation is not entitled to a dividends-received deduction, because "that dividend income has been taxed only once." *Ibid.*

Accordingly, the court concluded that New Hampshire's taxing regime did not favor "the unitary business with the

foreign subsidiary operating in New Hampshire [over] the unitary business with the foreign subsidiary not operating in New Hampshire," because in each scenario, the unitary business is "only taxed once" on the dividend income. Pet. App. 18a. Because "there is no 'differential treatment' that benefits the former and burdens the latter" (*ibid.*) (citing *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994)), the court held that "[subsection IV] is not unconstitutional on its face." *Id.* at 21a.

DISCUSSION

The Supreme Court of New Hampshire correctly held that subsection IV does not facially discriminate against foreign commerce. That decision does not conflict with any decision of this Court or another state court of last resort. Moreover, subsection IV has been repealed, see note 3, *supra*, further undermining any need for this Court's review.

In addition, there is an unresolved antecedent question of state law that renders the question presented somewhat hypothetical in the present posture of the case. Based on the disposition below, it is unclear whether subsection IV would have been applicable under the combined reporting regime to a unitary business with a foreign subsidiary doing business in New Hampshire, and accordingly it is unclear whether the constitutional issue resolved by the court below was actually presented by New Hampshire's tax regime even before the repeal of the operative provision. For all of those reasons, further review is not warranted.

A. The Decision Below Is Correct

1. a. GE contends that subsection IV facially discriminates in violation of the Commerce Clause because it permits the parent of an affiliated foreign subsidiary to deduct from taxable business profits the dividends received from that subsidiary only to the extent that the subsidiary's income is sub-

ject to New Hampshire tax. According to GE (Pet. 14-15), New Hampshire's "regime favors corporations engaging in local activity over their out-of-state competitors and tends to discourage corporations from plying their trades in protected [foreign] commerce." The Supreme Court of New Hampshire correctly rejected that contention, which improperly focuses on only half of the relevant equation.

In deciding this case, the supreme court properly "assess[ed] New Hampshire's taxing regime as a whole and look[ed] at the aggregate tax imposed upon a unitary business." Pet. App. 17a. Under that analytical approach, the conclusion is inescapable that New Hampshire's tax regime did not discriminate against foreign commerce. As the supreme court correctly explained (*id.* at 17a-19a), the purportedly discriminatory tax benefit allegedly conferred by subsection IV (namely, a dividends-received deduction for a combined group to the extent that the income of its dividend-paying foreign subsidiary was taxed by New Hampshire) was fully matched by a corresponding burden on the purportedly favored unitary group (namely, the foreign subsidiary's obligation to pay New Hampshire tax on the income apportioned to the State). By contrast, that additional tax burden was *not* imposed on the purportedly disfavored unitary groups (like GE) that accordingly did not receive a dividends-received deduction, because by definition their dividend-paying foreign subsidiaries had no income taxable in New Hampshire.

As a result, New Hampshire's scheme as a whole did not facially discriminate against foreign commerce, because there was no showing that "the aggregate tax imposed upon a unitary business" would be higher if its foreign subsidiaries did no business in New Hampshire and lower if they did. Pet. App. 17a. New Hampshire "d[id] not favor business activity in the [State] over business activities abroad," which "suggest[s] that the statute does not discriminate against foreign

commerce." *Kraft Gen. Foods, Inc.* v. *Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 79-80 (1992) (*Kraft*). There was no "differential treatment of in-state and [foreign] economic interests that benefits the former and burdens the latter," *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994), no "direct commercial advantage to local business," *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959), and no discrimination "in order to favor local commercial interests," *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 335 (1977). GE's claim of discrimination therefore fails.

b. GE does not dispute that, when the aggregate tax burdens imposed by New Hampshire's scheme on unitary businesses are considered, no discrimination can be demonstrated. GE contends (Pet. 18), however, that such analysis of aggregate tax burdens is inappropriate, and that the tax burden imposed on foreign subsidiaries doing business in New Hampshire must be ignored altogether in determining whether the State's tax regime discriminates against foreign commerce. In GE's view, it is simply irrelevant that the unitary group suffers no discrimination at all.

GE is mistaken. When confronting Commerce Clause challenges to state tax laws, this Court has repeatedly held that the proper mode of analysis entails a practical assessment of overall economic realities, not a hypertechnical exercise in arbitrary linedrawing. "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981). "In each case," the Court has said, "it is our duty to determine whether the statute under attack * * * will in its practical operation work discrimination." *Ibid.* (quoting *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)). "This concern with the actuality of operation, a dominant theme running through all state taxation cases,

extends to every aspect of the tax operations." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69 (1963). "[A] proper analysis must take 'the whole scheme of taxation into account.'" *Ibid.* (citation omitted).

GE's only response (Pet. 18) is to point to a footnote in *Kraft*, but *Kraft* provides no support for GE's counterintuitive position. That case involved a Commerce Clause challenge to Iowa's income-tax scheme, which allowed a corporate parent to deduct dividends received from domestic subsidiaries (including subsidiaries that had no Iowa taxable income), but did not permit such a deduction for dividends received from a foreign subsidiary on account of foreign business activity. *Kraft*, 505 U.S. at 74, 77.[4] Thus, under Iowa's scheme, Iowa did not tax *either* the income earned *or* the dividends paid by domestic subsidiaries with no Iowa operations, but it *did* tax the dividends received from foreign subsidiaries to the extent of their foreign operations. The Court held that Iowa's scheme facially discriminated against foreign commerce in violation of the Commerce Clause, because "Iowa imposes a burden on foreign subsidiaries that it does not impose on domestic subsidiaries." *Id.* at 80 (emphasis omitted).

In reaching that conclusion, the Court rejected the notion that the State's tax could be justified by looking to the effects of taxes imposed by *other* States and the United States. The Court explained that, "whatever the tax burdens imposed by the Federal Government or by other States, the fact remains that *Iowa* imposes a burden on foreign subsidiaries that it

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[4] Iowa used a single-entity reporting method, under which "Iowa does not directly tax the *income* of a subsidiary unless the subsidiary, itself, does business in Iowa. Thus, if a domestic subsidiary transacts business in Iowa, its *income* is taxed, but if it does not do business in Iowa, neither its income nor the dividends paid to its parent are taxed." *Kraft*, 505 U.S. at 74. The Court further observed that, unlike States that use a combined reporting method, "Iowa is not a State that taxes an apportioned share of the entire income of a unitary business, without regard for formal corporate lines." *Id.* at 74 n.9.

does not impose on domestic subsidiaries." *Kraft*, 505 U.S. at 80. In a footnote appended to that sentence, the Court also rejected any suggestion that Iowa's tax could be defended on the ground that it did not discriminate between domestic subsidiaries doing business in Iowa (whose income but not dividends would be taxed) and foreign subsidiaries doing business abroad (whose dividends but not income would be taxed). While acknowledging that no discrimination was evident as between those two categories of taxpayers, the Court stated that the relevant comparison was instead between "the taxpayers who are 'most similarly situated.'" *Id.* at 80 n.23. Given Iowa's scheme of taxation, "[a] corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad"; "the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary." *Ibid.* (citation omitted).

That footnote discussion plainly revolved around the peculiarities of the Iowa taxing regime at issue in *Kraft*, and cannot plausibly be read, as GE would have it, to preclude consideration of the tax burden imposed by New Hampshire on the foreign subsidiary of a unitary group that (hypothetically) obtained the benefit of the dividends-received deduction (at the price of subjecting the foreign subsidiary to New Hampshire tax). Under the Iowa scheme, there was no "independent basis" for taxing a foreign subsidiary that did no business in Iowa, because Iowa did not have a unitary tax scheme and taxed *no* subsidiaries except those doing business in Iowa. *Kraft*, 505 U.S. at 80 n.23. Moreover, the Court in *Kraft* made clear that the relevant focus, and "more appropriate comparison," under Iowa's regime was "between corporations whose subsidiaries do not do business in Iowa" (*ibid.*), because the aggregate effect of Iowa's tax scheme *was* to impose a dis-

criminatory tax burden on those unitary businesses depending on whether their subsidiaries were foreign or domestic.

No such discriminatory effect existed under New Hampshire's tax regime. Under the unitary approach to determination of taxable income, New Hampshire would have had an "independent" basis for taxing an apportioned share of the income of foreign subsidiaries doing no business in New Hampshire, and in lieu thereof was entitled to tax the dividends paid by such subsidiaries to members of a water's edge group, which represented value earned by such members. See *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 440 (1980). Given that the *income* of unitary foreign subsidiaries with no New Hampshire business activity was not subject to tax, there was no need or justification for a dividends-received deduction with respect to dividends from those subsidiaries. Whether foreign or domestic, in-state or out-of-state, subsidiaries included within a unitary group were subjected to equivalent tax burdens under New Hampshire's regime: the State taxed either their income or their dividends, but not both (and tailored the dividends-received deduction to ensure that neither double taxation nor tax exemption resulted). The same could not be said of Iowa's scheme, in which dividends paid by foreign subsidiaries with no Iowa operations were subject to tax, but *neither* the dividends *nor* the income of similarly situated domestic subsidiaries was taxed.[5]

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[5] While GE emphasizes the fact that a foreign subsidiary would have to file a separate BPT return under New Hampshire law, that fact is merely a consequence of the unitary group's own *election* to exclude its foreign subsidiary from the combined report, see N.H. Rev. Stat. Ann. § 77-A:1, XV(a) and (b). Moreover, separate reporting does not change the reality that the subsidiary is part of the unitary business, which will bear the financial burden of the tax that the subsidiary pays. See *Mobil Oil*, 445 U.S. at 438 (a unitary business is characterized by "functional integration, centralization of management, and economies of scale"). It is worth noting, moreover, that the "water's edge"

Far from providing support for GE's notion that the tax burden imposed on foreign subsidiaries doing business in New Hampshire must be ignored in evaluating GE's claim of discrimination, *Kraft* instead reaffirms the principle that the proper focus is on the aggregate effect of the State's tax statute. The Court observed that "[w]e have no reason to doubt" that "[i]n evaluating the alleged facial discrimination effected by the [challenged] tax, *it is not proper to ignore the operation of other provisions of the same statute.*" *Kraft*, 505 U.S. at 80-81 (citation omitted; emphasis added; second pair of brackets in original). When New Hampshire's tax regime is considered as a whole, it is clear that New Hampshire does not favor unitary businesses whose foreign subsidiaries operate in New Hampshire over unitary businesses whose foreign subsidiaries do no business in New Hampshire.[6]

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regime adopted by New Hampshire, which permits the foreign subsidiary doing business in New Hampshire to file a separate return by virtue of its geographic location, came about after States, including New Hampshire, were criticized for using a "worldwide combined reporting" system, under which a foreign subsidiary's income was automatically included in the unitary corporate parent's tax base. See Courtenay Ellis & Michael Quigley, *Barclays Bank—The Continuing Controversy Over Worldwide Unitary Taxation*, *available in* West law, 1994-WTR Fed. B.A. Sec. Tax'n Rep., 1 at *2-*3 (observing that this Court's decision in *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159 (1983), which "upheld the constitutionality of worldwide combined reporting of a [domestic-based] unitary business," triggered "a great deal of criticism from both U.S. and foreign-based multinational corporations" and ultimately led to a report issued under the auspices of the United States Department of the Treasury which "recommend[ed] that states voluntarily limit their taxation of so-called 'unitary' multinational businesses to U.S. 'water's edge (i.e. U.S.-generated) income"); *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 306, 324-327 (1994) (discussing criticisms of unitary taxation and observing that many States had shifted from worldwide reporting to the "water's edge" approach).

[6] Other state supreme courts have employed similar reasoning in consistently rejecting claims of facial discrimination directed against analogous state tax regimes. See *E.I. Du Pont de Nemours & Co.* v. *State Tax Assessor*, 675 A.2d 82 (Me. 1996); *In re Morton Thiokol, Inc.*, 864 P.2d 1175 (Kan. 1993).

B. The Decision Below Does Not Conflict With Decisions Of This Court Or Any State Court Of Last Resort

1. Contrary to GE's assertions (Pet. 13-17), there is no conflict between the decision below and this Court's decisions in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), and *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977). In *Fulton*, the Court held that a North Carolina intangible property tax imposed on the value of corporate stock violated the Commerce Clause. The tax was levied on the fair market value of corporate stock owned by North Carolina residents. *Fulton*, 516 U.S. at 327. Stockholders were entitled to a tax deduction based on the proportion of the issuing corporation's income that was subject to North Carolina tax. *Id.* at 328. For example, if a corporation did all its business in North Carolina, and thus paid North Carolina tax on 100% of its income, stockholders could deduct 100% of the value of their stock, resulting in no intangibles tax. By contrast, stock in a corporation doing no business in North Carolina, and thus paying no North Carolina income tax, was taxable at 100% of its value. The Court concluded that the intangibles tax facially discriminated against interstate commerce because "[a] regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce." *Id.* at 333. The Court noted that the State "practically concede[d] as much" and sought, instead, to defend the tax (unsuccessfully) on the ground that it "compensate[d] for the burden of the general corporate income tax

paid by corporations doing business in North Carolina." *Id.* at 334.[7]

As the court below correctly concluded, *Fulton* is "not analogous" to the present case. Pet. App. 20a. Unlike *Fulton*, this case involves determining the taxable income of a unitary business. As discussed (pp. 12-13, *supra*), New Hampshire's combined reporting method treated dividends paid by domestic group members differently from dividends paid by foreign members only because the income of the domestic members is included in the apportionable tax base, whereas the overseas income of foreign members is not (even though the Commerce Clause would have permitted its inclusion). The deduction afforded by subsection IV was available only if the foreign member was itself subject to the BPT, so that the operating income of the unitary business was not counted twice in determining its tax.

The provision at issue in *Fulton*, by contrast, did not operate to equalize the application of a unified income tax to the various facets of a unitary business. Instead, *Fulton* involved an "apples to oranges" comparison (516 U.S. at 337): the affirmative imposition of a *property* tax on North Carolina residents with respect to which the State allowed a reduction in the property's taxable value based on a *separate* economic actor's level of in-state activity and *income* tax paid. There was no unity of business between the issuing corporation and the taxpaying stockholder, and no equalization of burdens

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[7] A facially discriminatory tax may survive Commerce Clause scrutiny if it is a compensatory tax designed to make interstate commerce bear a burden already borne by intrastate commerce. *Fulton*, 516 U.S. at 331. To qualify as a compensatory tax, the State must (1) identify the intrastate tax burden for which it is attempting to compensate; (2) show that the tax on interstate commerce roughly approximates, but does not exceed, the tax on intrastate commerce; and (3) show that the events on which interstate and intrastate taxes are imposed are sufficiently similar in substance to serve as mutually exclusive proxies. *Id.* at 332-333.

under a single taxing statute. The *Fulton* Court was therefore required to test the North Carolina statute against the standards applicable to allegedly "compensatory" taxes. *Id.* at 334. Those standards have no application here, where the allegedly discriminatory tax benefit pertained to the same tax and the same economic actor (*i.e.*, the unitary business) as the corresponding and equivalent tax burden (*i.e.*, the tax imposed on a foreign subsidiary doing business in New Hampshire). Unlike the tax in *Fulton*, subsection IV "enable[d] in-state and out-of-state businesses to compete on a footing of equality," *id.* at 340, and it was therefore not facially discriminatory, and thus there is no reason to reach the "compensatory" tax question.

Boston Stock Exchange is likewise inapposite. That case involved a New York transfer tax on securities transactions occurring, at least in part, in New York. In order to protect in-state stock exchanges from losing sales to exchanges located in other States that imposed no tax, New York amended the transfer tax to provide, for certain taxpayers, a 50% reduction in the tax rate when the transaction involved an in-state sale, and, for all taxpayers, a maximum liability of $350 for a single transaction involving an in-state sale. *Boston Stock Exch.*, 429 U.S. at 323-328. The Court held that "[t]he obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." *Id.* at 331. It rejected the State's contention that the amendment compensated New York for the competitive disadvantage created by the transfer tax, stating that "the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister states." *Ibid.*

Unlike the tax at issue in *Boston Stock Exchange*, New Hampshire's dividend-received deduction had neither the purpose nor the practical effect of giving a "direct commercial

advantage" (429 U.S. at 329) to unitary businesses with foreign subsidiaries doing business in New Hampshire at the expense of unitary businesses whose foreign subsidiaries did no such business. As discussed, the sole purpose and effect of subsection IV in this context was to determine the proper taxable income of the unitary business and, in particular, to avoid counting dividend income twice. Thus, for a unitary business, the decision whether to have its foreign subsidiaries do business in New Hampshire was essentially tax-neutral. See Pet. App. 18a-19a. This case therefore does not present the type of "direct commercial advantage" for in-state businesses at issue in *Boston Stock Exchange*.

2. There is no conflict between the decision below and the decision of any state court of last resort. GE alleges (Pet. 11-13) that the decision below conflicts with *D.D.I., Inc.* v. *State*, 657 N.W.2d 228 (N.D. 2003) (*DDI*), in which the Supreme Court of North Dakota held unconstitutional a dividends-received deduction provision that, according to GE, "in all essential respects was identical to New Hampshire's." Pet. 12. But the State conceded in *DDI* that the taxing scheme facially discriminated against interstate commerce, and sought to defend the scheme only on the basis that it was compensatory. 657 N.W. 2d at 231. Thus, the court in that case had no occasion to consider the threshold question of facial discrimination at issue here.

In any event, the taxing scheme at issue in *DDI* was substantially different from the one at issue here. Subsection IV applied only in circumstances of common ownership; the parent corporation had to control a minimum of 80% of the subsidiary's stock in order to qualify for the dividends-received deduction. Moreover, in the context of a unitary business with a dividend-paying foreign subsidiary, the New Hampshire provision operated to ensure that the unitary business paid tax only once on the income reflected in the dividend. The

provision invalidated in *DDI*, by contrast, was not narrowly tailored to prevent double taxation of the identical gross business profits of a unitary business or a group of corporations under common control. To the contrary, the dividends-received deduction in *DDI* was available to any corporation owning any amount of stock in another corporation that paid income tax to the State.*

GE also alleges (Pet. 12-13) a conflict between the decision below and a series of California court of appeal decisions invalidating two dividends-received-deduction statutes. See *General Motors Corp.* v. *Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Ct. App. 2004), aff'd in part and rev'd in part on other grounds, 139 P.3d 1183 (Cal. 2006); *Farmer Bros. Co.* v. *Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Ct. App. 2003), rev. denied, No. B160061 (Cal. Aug. 27, 2003), cert. denied, 540 U.S. 1178 (2004); *Ceridian Corp.* v. *Franchise Tax Bd.*, 102 Cal. Rptr. 2d 611 (Ct. App. 2000). None of those decisions, how-

* GE asserts (Pet. Reply Br. 4) that the dividends at issue in *DDI* "were held to be apportionable" and "thus necessarily arose from the conduct of a unitary business in North Dakota." The fact that the dividends were "apportionable," however, does not necessarily implicate a unitary business, as North Dakota required "any taxpayer having income from business activity which is taxable both within and without this state" to apportion its income. N.D. Cent. Code § 57-38.1-02 (2005). Moreover, "[b]usiness income" includes "income from tangible and intangible property if the acquisition, management, and disposition of property constitute integral parts of the taxpayer's regular trade or business." *Id.* § 57-38.1-01. In *DDI*, because the taxpayers were engaged in the business of "managing assets" (657 N.W.2d at 229), dividends received from non-unitary corporations may well have constituted "business income." Furthermore, a unitary business filing a combined return would have excluded dividends paid by unitary-group members from income altogether, as intergroup transfers. See *Amerada Hess Corp.* v. *State*, 704 N.W.2d 8, 11 (N.D. 2005). Thus, if the dividends at issue in *DDI* had been paid from unitary sources, as GE contends, they would have been excluded from taxation altogether, and the dividends-received deduction struck down by the court would not have been implicated.

ever, has been reviewed by the Supreme Court of California.[9] See Sup. Ct. R. 10(b). Moreover, another decision of the California court of appeal upheld California's differential treatment of domestic and foreign subsidiary dividends in the context of a water's edge group filing a combined return. See *Fujitsu IT Holdings, Inc.* v. *Franchise Tax Bd.*, 15 Cal. Rptr. 3d 473, 487-490 (Ct. App. 2004).[10] A conflict among decisions of California's intermediate appellate court does not merit this Court's review.

C. Other Factors Counsel Against Plenary Review

Further review is also unwarranted because the New Hampshire legislature has repealed subsection IV effective August 17, 2007. See H.B. 598-FN-A, 2007 Sess. (N.H.) <http://gen-court.state.nh.us/legislation/2007/hb0598.html>. Thus, the precise issue presented in the petition for a writ of certiorari appears to lack substantial recurring importance. Petitioner asserts (Pet. Reply to Supp. Br. 2-4) that the same issue would arise in the absence of subsection IV by virtue of the state constitution, but that issue of state law is best addressed by the state courts in a future case that actually presents the question.

In addition, the theory of discrimination advanced by GE is predicated on a disputed interpretation of subsection IV

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[9] The California Supreme Court affirmed in part and reversed in part portions of the court of appeal's decision in *General Motors*, but it did not review the portion of the decision addressing the constitutionality of the dividends-received deduction. See *General Motors Corp.* v. *Franchise Tax Bd.*, 139 P.3d 1183 (Cal. 2006).

[10] GE contends (Pet. Reply 6-7 n.1) that *Fujitsu* is unlike this case, because there, the "income of [the] domestic dividend payor is included in [the] tax base under [the] combined report." As discussed, however, the fact that New Hampshire permits a foreign subsidiary doing business in New Hampshire to file a separate return does not mean that the unitary group escapes the economic burden of the tax formally imposed on the subsidiary.

that has yet to be adopted by the New Hampshire courts. GE's theory depends on the threshold assumption that a water's edge combined group would be eligible for the dividends-received deduction afforded by subsection IV if the foreign subsidiary paying the dividend were subject to New Hampshire's BPT. Respondent has contended throughout these proceedings, however, that subsection IV was not available to corporations filing a combined report, regardless of whether the foreign dividend-payor is subject to the BPT. Br. in Opp. 8, 24-25; Pet. App. 7a-8a, 30a, 33a-34a. The court below did not resolve that question, instead merely "assum[ing] without deciding that" GE's interpretation was correct. Pet. App. 10a-11a. In light of this Court's instruction "never to anticipate a question of constitutional law in advance of the necessity of deciding it," *Liverpool, N.Y. & Phila. S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885), further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
RICHARD T. MORRISON
Acting Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
JONATHAN L. MARCUS
Assistant to the Solicitor General
KENNETH L. GREENE
FRANCESCA U. TAMAMI
Attorneys

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IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

STEPHEN P. KRANZ, Tax Counsel
Counsel of Record
DOUGLAS L. LINDHOLM, President
DIANN L. SMITH, General Counsel
JANA MALONE, Legislative Counsel
J. HUGH MCKINNON, Counsel
Lawyers' Coordinating Subcommittee
COUNCIL ON STATE TAXATION
122 C Street, N.W., Suite 330
Washington, D.C. 20001
(202) 484-5221

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does the New Hampshire business profits tax regime facially discriminate against foreign commerce in violation of the Commerce Clause by providing a tax deduction for dividends received from foreign subsidiaries only to the extent that the foreign subsidiary conducts income-generating business in the State, a restriction virtually identical to restrictions struck down by this court in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), and by state courts of North Dakota, California, and Mississippi?

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GENERAL ELECTRIC COMPANY,
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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of the Council On State Taxation as *amicus curiae* in support of the Petitioner in the above captioned matter.[1]

[1] No Counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae, its members or counsel has made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief and their letters have been filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

Description of Association Filing as Amicus

The Council On State Taxation (COST) is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest corporations in the United States, including companies from every industry segment. COST's membership conducts business in every state and between every state. The membership are thus concerned when states or localities seek to circumvent this Court's application of Constitutional limitations on states' ability to discriminate against interstate commerce. COST's mission is to preserve and promote equitable and nondiscriminatory taxation of multi-state businesses. Thus, COST members and the organization itself have a financial and organizational interest in the Court's determination in this case.

Description of Amicus Interest

The New Hampshire Supreme Court's decision, if left unchecked, provides a roadmap for other states to discriminate against interstate commerce. COST has a unique perspective on the wider applications and implications that the reasoning of the New Hampshire court could have on other taxpayers and other state and local governments, and seeks to bring to this Court's attention the importance of resolving this issue. It has been the unfortunate experience of COST's members that many states have a significant reluctance in remedying unconstitutional taxes. Because of this historical reluctance, COST has an interest in seeing this issue resolved. COST has a strong interest in preventing discrimination against interstate commerce from proliferating, and, accordingly, has a strong interest in the Court's review of this case.

SUMMARY OF ARGUMENT

The analysis adopted by the New Hampshire court is flawed in that it disregards several significant decisions of this Court and conflicts with every other State court decision on this issue. The New Hampshire Supreme Court held that the State of New Hampshire does not discriminate against foreign commerce although the State's taxing regime allows a parent company to claim a deduction for dividends from foreign subsidiaries with operations in New Hampshire, but does not allow a parent company to deduct dividends it receives from a foreign subsidiary without operations in New Hampshire.

Unchecked, the New Hampshire Supreme Court's decision provides a ready roadmap for states to discriminate against interstate commerce. Further, even taxes found unconstitutional by this Court and others could be revived using the New Hampshire model. In either case, the decision provides a blueprint for states to impose a tax burden on interstate commerce without imposing the same burden on their own.

Lastly, a denial of *certiorari* in this case will encourage states to rely on an unproven and suspect tax structure. If this decision is allowed to stand, it will create uncertainty for taxpayers and state governments alike.

ARGUMENT

I. Under the Commerce Clause of the Unites States Constitution, and as affirmed by numerous decisions of this Court, the New Hampshire business profits tax unconstitutionally discriminates against foreign commerce because the net result of the tax regime is the favoring of local commercial interests over out-of-state businesses.

The question presented in this appeal is whether the New Hampshire business profits tax (BPT) regime facially dis-

criminates against foreign commerce in violation of the Commerce Clause by providing a tax deduction for dividends received from foreign subsidiaries only to the extent that the foreign subsidiary conducts income-generating business in the state.

New Hampshire's BPT violates the Commerce Clause by impermissibly favoring local commercial interests over out-of-state business. Decades of U.S. Supreme Court precedent hold that, under the Commerce Clause, a state may not discriminate in its tax system in favor of local companies over out-of-state companies. If the holding below is allowed to stand, it will undermine numerous Supreme Court decisions.

The Commerce Clause of the United States Constitution provides that Congress shall have the authority to "regulate commerce . . . among the several states." Art. I, § 8, cl. 3. This affirmative grant of power has given rise to a concomitant negative or dormant implication—the states may not discriminate against interstate trade. *Associated Industries v. Lohman*, 511 U.S. 641, 646 (1994). The dormant element of the Commerce Clause thus prohibits economic protectionism on the part of states. States may not adopt measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Id* at 647. Thus, a state may not tax a transaction or incident more heavily when it crosses state lines than if it were to occur entirely within one state. *Id.* Economic protectionism can be made out by a showing of either discriminatory effect or discriminatory intent. *Bacchus Imports Ltd. v. Diaz*, 468 U.S. 263, 270 (1984). Nor may a state tax a transaction or incident more heavily when it crosses national borders than if it were to occur entirely within one state. In fact, this Court has held that foreign commerce is afforded even greater protection than that afforded interstate commerce. *Kraft General Foods, Inc. v. Iowa Department of Revenue*, 505 U.S. 71 (1992); *Japan*

Line, Ltd., et al. v. County of Los Angeles, 441 U.S. 434, 449 (1979).

Petitioner GE is the parent company of numerous affiliated corporations, both domestic and foreign, that carry on a wide range of business operations in the United States and in other countries. It is undisputed that during each of the tax years at issue in this case (1990-1999), a portion of GE's business operations were conducted by foreign affiliates that did no business in New Hampshire or in any other State. However, because GE conducted business in the State, GE was required to file a New Hampshire BPT return and pay a BPT for each of the tax years at issue. Its foreign subsidiaries, on the other hand, did no business in New Hampshire and, accordingly, did not file their own BPT tax returns.

In the meantime, certain of GE's foreign subsidiaries paid dividends to GE, and these dividends were calculated as a part of GE's total BPT liability in the State of New Hampshire. But, only because GE's foreign subsidiaries did no business in New Hampshire, the State denied GE any dividends received deduction with respect to those dividends.

The crux of this case, and the reason the dividend deduction scheme is clearly invalid, lies with the fact that New Hampshire is treating dividends received from foreign subsidiaries not doing business in the state less favorably than those received from foreign subsidiaries doing business in the state—in direct conflict to many decisions by this Court. In 1977, the U.S. Supreme Court articulated a 4-prong test for determining whether a state is violating the Commerce Clause with respect to taxes affecting interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Under the *Complete Auto* test: (1) activities taxed must have a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the state tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. *Id.*

Of primary significance in this case is the third prong in *Complete Auto* which begs the question: Is New Hampshire's taxing scheme with respect to dividends received from foreign subsidiaries that do not do business in New Hampshire discriminatory ?

In *Fulton Corp. v Faulkner*, 516 U.S. 325 (1996), this court addressed a North Carolina intangibles tax that was imposed on the value of corporate stock owned by North Carolina residents. The Court held that the North Carolina taxing scheme favored domestic corporations over their foreign competitors in raising capital in the state and discouraged domestic companies from participating in interstate commerce. Just as in *Fulton*, the New Hampshire tax regime favors corporations engaged in local activity over their out-of-state competitors.

The court below determined that when analyzing the dividends-received deduction as part of a larger taxing scheme, there was no improper discriminatory treatment. In taking this position, the court ignored *Fulton*, as well as the unanimous opinion in *Japan Line* where Justice Blackmun writes that: "*In addition to* answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must *also* inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause." 441 U.S. 434, 449 (1979)(emphasis added).

In other words, the lower court's analysis was incomplete. The court finished its analysis after asking and answering whether the New Hampshire taxing regime imposed multiple taxation, failing to address whether the taxing regime in-

volved discrimination in favor of companies doing business in New Hampshire.

There are many more cases that validate the holding in *Complete Auto* and to which the lower court could have looked to recognize the inadequacy of its analysis in the GE matter. Six years after *Complete Auto*, the Supreme Court ruled in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), that West Virginia's wholesale gross receipts tax, from which local manufacturers were exempt, unconstitutionally discriminated against interstate commerce. In the *Armco* Court's view, "A State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Id.* at 642. New Hampshire's dividends-received deduction contains the same constitutional flaw as West Virginia's gross receipts tax regime. Just as West Virginia favored local manufacturers by exempting the gross receipts tax on those manufacturers, New Hampshire favors local businesses by only allowing deductions for dividends from subsidiaries with a local presence.

Another case parallel to the GE case is *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388 (1984), which involved a New York Domestic International Sales Corporation. In *Westinghouse*, the state had determined that a Domestic International Sales Corporation could receive a tax incentive only to the extent its business activity was occurring in the State of New York. The Supreme Court held that a State may not encourage the development of local industry by means of taxing measures that invite a multiplication of preferential trade areas within the United States and that this was an unconstitutional violation of the Commerce Clause. *Id.* In both *Westinghouse* and the GE case, we see both the State of New York and the State of New Hampshire attempting to unconstitutionally link tax incentives for international businesses to in-state activity.

In *Kraft*, the Court addressed the inclusion of dividends from foreign subsidiaries in the tax base and found that Iowa facially discriminated against foreign commerce in violation of the Foreign Commerce Clause. The Court in that case stated that: "It is indisputable that the statute treats dividends received from foreign subsidiaries less favorably than those received from domestic subsidiaries by including the former, but not the latter, in taxable income. None of the several arguments made by Iowa justifies Iowa's differential treatment of foreign commerce." *Kraft*, 505 U.S. 71 (1992). The Court went on to determine that a state's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause, even if the state's own economy is not a direct beneficiary of the discrimination: "As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions." *Id.*

Finally, in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994), the U.S. Supreme Court found that the purpose behind a law is not the test for determining whether it is "facially discriminatory" but, rather, if it is discriminatory, it is *per se* invalid unless it serves a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Id.* In disregarding *Oregon*, the lower court instead focused on whether New Hampshire tax law resulted in double-taxation for the Petitioner and not, as the Court in *Oregon* clearly directed, on whether the law is "facially discriminatory" and, therefore, "*per se* invalid". *Id.*

In sum, it is clear from the settled decisions of the U.S. Supreme Court that the New Hampshire Supreme Court has made an incorrect ruling with respect to Petitioner GE's case. A straightforward analysis of this Court's past decisions makes clear that the New Hampshire dividends-received deduction unlawfully discriminates against foreign commerce

by providing favorable treatment to entities that do business in the state.

II. The New Hampshire decision conflicts with every other State court decision on this issue.

States have a long history of deliberately using their tax systems to give in-state businesses an unfair competitive advantage over out-of-state or foreign businesses. Because the decision below creates a roadmap for discrimination, it is critical that the U.S. Supreme Court review the tax structure before it is adopted by other states. Such review will help minimize fiscal disruption and uncertainty for states and taxpayers alike. Furthermore, as the number of cases decided by this Court reveals, the question of whether a state tax unconstitutionally discriminates arises routinely. See, e.g. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Armco*, 467 U.S. 638 (1984); *Bacchus*, 468 U.S. 263 (1984); *Westinghouse*, 466 U.S. 388 (1984); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); *Kraft*, 505 U.S. 71 (1992); *Fulton*, 516 U.S. 325 (1996).

Several recent state law decisions confirm the continuing contentiousness of discriminatory state taxes that are imposed on dividends from out-of-state or foreign subsidiaries. *D.D.I., Inc. v. North Dakota*, 657 N.W.2d 228 (N.D. 2003); *Farmer Brothers Co. v. Franchise Tax Board*, 108 Cal. App. 4th 976 (2003); *AT&T Corp. v. State Tax Commission*, Dkt. No G-2000-31 (May 26, 2006).

In *D.D.I., Inc.*, the North Dakota Supreme Court struck down the state's dividends-received deduction provision as unconstitutional. North Dakota Code section 57-38-01.3(1)(g) provided a dividends-received deduction only to the extent that the company paying the dividend was subject to North

Dakota tax. As a result, the taxpayers—Florida corporations engaged in business in North Dakota—were denied a deduction for dividend income received from other corporations conducting business either wholly or primarily outside of North Dakota. The North Dakota tax commissioner argued that the provision was a valid compensatory tax, despite the acknowledgment that the provision was facially discriminatory. Relying on *Fulton*, the court rejected the commissioner's argument. According to the court, the deduction provision "effectively imposes a double layer of tax on the out-of-state income but not on the in-state income" and therefore "impermissibly discriminates against interstate commerce." *Id.* at 234-235.

The similarities between North Dakota's dividends received deduction in *D.D.I.* and New Hampshire's dividends received deduction in the present case are apparent. Despite the similarities, the New Hampshire court "found no improper discriminatory treatment" in RSA 77-A:4, IV, New Hampshire's dividends-received deduction. The court incorrectly distinguished the two cases by focusing on taxing symmetry rather than the real issue in this case: whether New Hampshire's dividends-received deduction provision discriminates against foreign commerce.

Similarly, in *Farmer Brothers Co.*, the California Court of Appeals held that the dividends-received deduction provided for under Section 24402 of the California Revenue and Taxation Code violates the Commerce Clause of the U.S. Constitution by discriminating against corporations engaged in interstate commerce. That section provided an income tax deduction for a portion of the dividends received from another corporation to the extent that the dividends were declared from income which was subject to California's franchise tax, alternative minimum tax, or corporation income tax. The court first held that section 24402 discriminates between transactions on the basis of an interstate element,

which is facially discriminatory under the Commerce Clause. The court then addressed the issue of whether the DRD was a compensatory tax and determined that it failed to meet the three conditions necessary for a valid compensatory tax under *Fulton*.

Once again, the similarities between California's dividends-received deduction in *Farmer Brothers* and New Hampshire's dividends-received deduction in the present case are apparent. For the same incorrect reasons above, the New Hampshire court incorrectly distinguished the two cases, finding "no improper discriminatory treatment" in New Hampshire's dividends-received deduction.

More recently, in *AT&T Corp.*, a Mississippi trial court found the state's dividends-received deduction statute to be invalid because it discriminated against interstate commerce. Mississippi Code section 27-7-15(4)(i) permits a parent corporation to exclude from taxable income those dividends that are received from subsidiaries taxed in Mississippi. The dividends-received deduction statute does not, however, permit a parent corporation to exclude dividends received from subsidiaries that do not have a taxable presence in Mississippi. Accordingly, the court ruled that the statute discriminated against interstate commerce. The court stated that Mississippi could not deny a parent corporation the right to exclude dividends merely because its subsidiaries chose not to do business in Mississippi.

While the majority of Supreme Court and state cases discussed herein involve discrimination against interstate commerce as opposed to foreign commerce, the Commerce Clause, as *Japan Line* makes clear, provides an even more rigorous standard of protection to foreign commerce.

III. The potential reach of the New Hampshire court's analysis and past experience with states' willingness to adopt discriminatory taxes suggest that it is imperative for this Court to promptly address the issue.

Unchecked, the New Hampshire Supreme Court's decision provides a ready roadmap for states to discriminate against interstate commerce. While for many sensible and judicious reasons this Court is cautious in accepting cases, it is important that the Court act to discourage other states from adopting New Hampshire's discriminatory provision. The risk of proliferation is not mere fear-mongering but is based on painful and frustrating past experience. State legislatures enact unconstitutional taxes for as many reasons as there are state legislators. Whether because of time constraints, budget limitations, misunderstanding, or willful disregard, state legislatures have always and will continue to enact tax statutes that unconstitutionally discriminate against out-of-state commerce. Only steadfast enforcement of taxpayers' constitutional rights by this Court will deter future attempts to adopt and apply discriminatory tax schemes.

Even taxes previously found unconstitutional could be revived using the New Hampshire model. Should this Court deny *certiorari*, nothing will prevent North Dakota, California, and Mississippi from re-enacting dividends-received deduction provisions identical to those previously declared unconstitutional in *D.D.I., Inc.*, *Farmer Brothers Co.*, and *AT&T Corp.* The New Hampshire decision's blueprint for taxing foreign dividends more heavily when the foreign corporation does no business in the state creates an irresistible political temptation that will undoubtedly exacerbate the problem of discriminatory taxation of foreign commerce.

Review of this case will prevent states from building budgets on unsound revenue streams. Without review states will rely on unproven and suspect tax structures, creating instabil-

ity in their revenue systems. The longer the validity of a tax remains uncertain, the greater the potential upset to state budgets should the tax ultimately be found unconstitutional.

Because the New Hampshire decision departs from this Court's jurisprudence and provides a roadmap for further discrimination, the decision warrants review by this Court.

CONCLUSION

For the reasons state above, *amicus curiae* respectfully requests the United States Supreme Court to accept this case for review.

Respectfully submitted,

STEPHEN P. KRANZ, Tax Counsel
Counsel of Record
DOUGLAS L. LINDHOLM, President
DIANN L. SMITH, General Counsel
JANA MALONE, Legislative Counsel
J. HUGH MCKINNON, Counsel
Lawyers' Coordinating Subcommittee
COUNCIL ON STATE TAXATION
122 C Street, N.W., Suite 330
Washington, D.C. 20001
(202) 484-5221

Counsel for Amicus Curiae